TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 130.

OLIVER O. FORSYTH, ADMINISTRATOR OF THE ESTATE OF JACOB FORSYTH, DECEASED, PLAINTIFF IN ERROR,

vs.

HENRY F. T. VEHMEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JANUARY 2, 1899.

(17,243.)

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IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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a UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JACOB FORSYTH, Plaintiff in Error,
vs.
HENRY F. T. VEHMEYER, Defendant in Error. } Error to the Supreme Court of Illinois.

Jacob Forsyth, plaintiff in error, by Edward Roby, his counsel, complains to the Supreme Court of the United States of America, and says that in the record and proceedings in the said supreme court of Illinois in the case lately pending therein wherein he, said Jacob Forsyth, was appellant and said Henry F. T. Vehmeyer was appellee, upon an appeal from a judgment rendered in the appellate court in and for the first district of said State, there is manifest error in this, to wit:

The said supreme court of Illinois ought to have reversed the judgment of the said appellate court and the judgment of the superior court of Cook county, in said State, and ought not to have affirmed the said judgments or either of them.

The judgment of the superior court of Cook county, Illinois, in said record shown, was and is erroneous and ought to be reversed,

because the discharge in bankruptcy therein pleaded and
b proved was and is a bar to the action, and judgment should have been for the defendant.

And because the superior court of Cook county excluded evidence offered by the defendant in the case in that court which ought to have been admitted, and admitted evidence offered by the plaintiff in that court which ought to have been excluded.

Wherefore and for divers other manifest errors appearing upon the face of said record the said Forsyth, plaintiff in error herein, prays that the said judgment of the supreme court of Illinois may be reversed, and that said judgment of the appellate court of Illinois in said record shown may be reversed, and that the said judgment of the superior court of Cook county in said record shown may be reversed, and that said plaintiff in error may have such other and further or different relief and order in the premises as may be meet.

EDWARD ROBY,
Counsel for said Plaintiff in Error.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between Jacob Forsyth, appellant, and Henry F. T. Vehmeyer, appellee, a manifest error hath happened, to the great damage of the said Jacob Forsyth, appellant, as by his complaint

appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES T. JONES,
Clerk of the Circuit Court of the United States for the Southern Dist. of Illinois.

Allowed by—
JOSEPH N. CARTER,
Chief Justice Supreme Court, State of Illinois.

d [Endorsed:] Supreme Court of the United States. Jacob Forsyth *vs.* Henry F. T. Vehmeyer. Writ of error. Filed Dec. 10, 1898. C. Mamer, clerk of supreme court. Copy deposited for the defendant in error in the clerk's office.

e In the Supreme Court of Illinois.

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, a copy of the foregoing writ or error for the defendants in error was lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said court this twenty-seventh day of December, A. D. 1898.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled 12, 27, '98. C. M.]

f UNITED STATES OF AMERICA, *ss:*

To Henry F. T. Vehmeyer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's

office of the supreme court of the State of Illinois, wherein Jacob Forsyth is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph N. Carter, chief justice of said supreme court of Illinois, this tenth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

JOSEPH N. CARTER,
Chief Justice of the Supreme Court of State of Illinois.

g [Endorsed:] Supreme Court of the United States. Jacob Forsyth, pl'ff in error, *vs.* Henry F. T. Vehmeyer, def't in error. Citation. I hereby admit service of this citation on me this 24th day of Dec., 1898. M. W. Robinson, attorney for def't in error.

On this 24th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared Edward Roby before me, the subscriber, a notary public in and for the county of Cook, in the State of Illinois, and makes oath that he delivered a true copy of the within citation to M. W. Robinson, Esq., in person, as appears by his admission of service on the back thereof, and that said Robinson was and is the attorney for Henry F. T. Vehmeyer in the suit herein named in the superior court of Cook county and the supreme court of Illinois.

EDWARD ROBY.

Sworn to and subscribed the 24th day of December, A. D. 1898.

[Seal of George A. Smith, Notary Public, Cook County, Ill.]

GEORGE A. SMITH,
Notary Public.

h In the Supreme Court of Illinois.

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER.

I, Christopher Mamer, clerk of said supreme court, do hereby certify that on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, a copy of the foregoing citation was lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said court this twenty-seventh day of December, A. D. 1898.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled 12, 27, '98. C. M.]

i In the Supreme Court of Illinois.

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER.

I, Christopher Mamer, clerk of the supreme court of Illinois elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from one (1) to one hundred and seventy-five (175), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including a certified copy of the opinion of the court, as the same remain- of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affiixed, at Springfield, this twenty seventh day of December, in the year of our Lord one thousand eight hundred and ninety eight.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled 12, 27, '98. C. M.]

1 At a supreme court begun and held at Springfield, on Tuesday, the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that heretofore, to wit, on the sixth day of June, A. D. 1898, there was filed in the office of the clerk of said court a certain transcript of the record and proceedings of the superior court of Cook county, Illinois, and of the appellate court of Illinois, first district; which said transcripts *are* in the words and figures following, viz:

2 UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable Jonas Hutchinson, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county & State, on the first Monday, being the seventh day, of June, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

Present: The Honorable Jonas Hutchinson, judge of the superior court of Cook county; Charles S. Deneen, State's attorney; James Pease, sheriff of Cook county.

Attest: JOHN A. LINN, *Clerk.*

Be it remembered that heretofore, to wit, on February 24th, in the year of our Lord one thousand eight hundred and ninety-one, there was filed in the office of the clerk of the superior court of Cook county a certain præcipe for summons, which is in the words and figures as follows, to wit:

3 STATE OF ILLINOIS, } ss:
County of Cook, }

Superior Court of Cook County, April Term, A. D. 1891.

HENRY F. T. VEHMEYER, Plaintiff, } Debt.
vs.
JACOB FORSYTH, Defendant. } Damages, $2,000.

The clerk of said court will issue a summons in the above entitled cause to said defendant in a plea of debt, to the damage of said plaintiff in the sum of two thousand dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the April term of said court, A. D. 1891.

JAMES FRAKE,
Plaintiff's Attorney.

To Patrick McGrath, Esq., clerk.

Chicago, February 24, 1891.

4 And afterwards, to wit, on the same day and year last aforesaid, there issued out of the office of the clerk of said court the people's writ of summons; which said writ, with the sheriff's return endorsed, is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

The People of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Jacob Forsyth, if he shall be found in your county, personally to be and appear before the superior court of Cook county on the first day of the next term thereof, to be holden at the court-house in Chicago, in said county, on the first Monday of April next, to answer unto Henry F. T. Vehmeyer of a plea that he render to the said plaintiff two thousand dollars, which he owes to and unjustly detains from said plaintiff, to the damage of said plaintiff, as is said, in the sum of two thousand dollars; and have you then and there this writ, with an endorsement hereon in what manner you shall have executed the same.

Witness Patrick McGrath, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 24th day of February,
5 A. D. 1891.

[SEAL.] PATRICK McGRATH, *Clerk.*

P'd .75.

Served this writ on the within-named defendant, Jacob Forsyth, by reading the same to him this 25th day of February, 1891.

JAMES H. GILBERT, *Sheriff,*
By WM. M. HENRY, *Deputy.*

And afterwards, to wit, on the same day and year last aforesaid, there was filed in the office of the clerk of said court a certain declaration in debt, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, to the March Term, 1891.

Henry F. T. Vehmeyer, plaintiff in this suit, by James Frake, his attorney, complains of Jacob Forsyth, defendant, in a plea of debt:

For that whereas the plaintiff, in the July term of said court, in the year 1871, to wit, on or about the 29th day of July, in
6 the same year, by the consideration and judgment of the said court, recovered against the defendant in a certain action upon the case the sum of eight hundred and thirty-three and $\frac{35}{100}$ dollars damages, and also the costs of the plaintiff in that behalf, taxed at, to wit, the sum of six and seventy-five hundredths dollars, whereof the defendant was convicted, as by the record thereof did fully appear, which record was destroyed by the great fire of October eight- and ninth, A. D. 1871, which said judgment still remains in full force, yet the defendant has not paid to the plaintiff the said sums of money so recovered by him as aforesaid, together amounting to, to wit, the sum of eight hundred and forty and $\frac{10}{100}$ dollars, or any part thereof, but refuses so to do, to the damage of

the plaintiff of two thousand dollars, and therefore he brings his suit, etc.

JAMES FRAKE,
Attorney for Plaintiff.

And afterwards, to wit, on April 8th, A. D. 1891, there was filed in the office of the clerk of said court a certain plea, which is in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

JACOB FORSYTH }
vs.
HENRY F. T. VEHMEYER. }

7 And the said defendant, by Goudy, Green & Goudy, his attorneys, comes and defends the wrong and injury when, &c., and *said* that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against him, the said defendant; and of this he puts himself upon the count-y, &c.; and for a further plea in this behalf the said defendant says that there is not and never was any record of the supposed recovery in the said declaration mentioned remaining in the said superior court of Cook county, in manner and form as the said plaintiff hath in his above declaration alleged; and this the said defendant is ready to verify. Wherefor- he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

And for a further plea in this behalf the said defendant says that the plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that after the said supposed recovery of the said supposed judgment in the said declaration mentioned, and before the commencement of this suit, to wit, on the thirtieth day of December, 1880, the district court of the United States for the district of Indiana granted to the said defendant a certain discharge in these words and figures, to wit:

In the District Court of the United States for the District of Indiana.

In the Matter of JACOB FORSYTH, Bankrupt. 3292. Bankruptcy.

8 DECEMBER 30, 1880.

Whereas Jacob Forsyth has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in that behalf:

It is therefore ordered by the c-urt that said Jacob Forsyth be for-

ever discharged from all debts and claims which by said act are made ap-rovable against his estate and which existed on the 30th day of August, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

And this the said defendant is ready to verify. Wherefor- he prays judgment if the plaintiff ought to have or maintain his aforesaid action against him.

GOUDY, GREEN & GOUDY,
Defendant's Attorney-.

And afterwards, to wit, on December 18th, A. D. 1891, there was filed in the office of the clerk of said court a certain demurrer, which is in the words and figures as follows, to wit:

9 STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Superior Court of Cook County.

HENRY F. T. VEHMEYER }
vs. } Debt.
JACOB FORSYTH. }

And the plaintiff, as to the plea of the defendant by him first above pleaded, says that the same and the matter- therein contained, in manner and form as the same are therein pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action, and that he is not bound in law to answer the same; and this he is ready to verify.

Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment and his damages, etc., to be adjudged to him, etc.

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because he says that there is such record of said recovery remaining in the said superior court of Cook county, as he has above in his said declaration alleged; and this he prays may be inquired of by the country, etc.

Withdrawn.

10 And the plaintiff, as to the plea of the defendant by him thirdly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action against the defendant, because he says that the judgment in said declaration mentioned is in respect to a debt or claim which is by the act in said plea mentioned excepted from the operation of a discharge in bankruptcy.

And this the plaintiff prays may be inquired of by the country, etc.

2. And for a further replication to the plea of the defendant by him thirdly above pleaded the plaintiff, by leave of the court first had and obtained, says *preclude non*, etc., because he says that the action

wherein the judgment mentioned in the plaintiff's declaration in this case was recovered against said defendant was brought by the plaintiff against the defendant in the said superior court of Cook county to recover damages claimed by the plaintiff in said action to have been sustained by said plaintiff by reason of alleged fraud practiced by the defendant upon said plaintiff, by which the plaintiff was induced to advance and pay to the defendant a large amount of money, to wit, about the sum of twelve hundred dollars, by the false and fraudulent representations of the defendant that he, the defendant, owned and had in his possession ready for delivery a large quantity, to wit, six hundred cords, of cord-wood in Lake county, in the State of Indiana; and that the said action and the right to recover therein were found- solely upon the said fraud of said defendant; and the plaintiff avers that issue was joined in that
11 action by the parties thereto upon the material allegations so made by said plaintiff therein in respect to said fraud, and that trial by a jury was had therein, and a verdict upon the issues so joined was rendered therein in favor of the plaintiff and against the defendant for said sum of eight hundred and thirty-three and $\frac{33}{100}$ dollars as the damages which had been sustained by said plaintiff by reason of said alleged fraud of the defendant; and the plaintiff avers that the judgment hereinabove set forth in the plaintiff's declaration was entered and rendered by said superior court of Cook county upon said verdict aforesaid, and was,— aforesaid, founded solely upon the fraud practiced by the defendant, as aforesaid, upon said plaintiff; and plaintiff avers that said judgment in his said declaration set forth is a debt or claim which is by the said act in defendant's third plea mentioned excepted from the operation of the discharge in bankruptcy which is by said defendant in his said third plea pleaded and set forth; and the plaintiff was not by virtue of his said alleged discharge in bankruptcy in said third plea pleaded discharged from the debt or claim of the judgment mentioned and set forth in plaintiff's declaration herein; and this the plaintiff is ready to verify.

3. And for a further replication to the plea of the defendant by him thirdly above pleaded the plaintiff, by leave of the court first had and obtained, says *preclude non*, etc., because he says
12 that there is not any record of the supposed discharge in bankruptcy granted to said defendant mentioned and set forth in the defendant's said third plea remaining in the said district court for the district of Indiana, in manner and form as the defendant has above in his said third plea alleged.

And the defendant prays — may be inquired of by the country, etc.

M. W. ROBINSON,
Plaintiff's Attorney.

And on the same day and year last aforesaid, being one of the days of the December term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

This cause coming on to be heard upon the demurrer to the defendant's first plea filed herein, and after arguments of counsel and due deliberation by the court, said demurrer is sustained and leave given to the plaintiff to file several replications to the defendant's third plea filed herein, and the defendant is hereby required to rejoin thereto within ten days from this date.

And afterwards, to wit, on February 10, A. D. 1892, there
13 was filed in the office of the clerk of said court a certain demurrer and similiter, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss:*
County of Cook,

In the Superior Court of Cook County.

JACOB FORSYTH
ads.
HENRY F. T. VEHMEYER. } Debt.

And the defendant, as to the said replication of the plaintiff to the said second plea of the defendant, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefor-, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc.

And the defendant, as to the first replication of the plaintiff to the said third plea of the defendant, says that the same and the
14 matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefor-, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc.

And the defendant, as to the second replication of the plaintiff to the said third plea of the defendant, says that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this the said defendant is ready to verify. Wherefor-, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc. And the said defendant states and shows to the court here the following cause of demurrer in law to the said replication—that is to say, that the said plaintiff had not concluded his said replication with a verification, but, on the contrary thereof, hath concluded it by putting himself upon the country; and also for that the said replication is in other respects uncertain, informal, and insufficient, etc.

And the defendant, as to the said third replication of the plaintiff to the said third plea of the defendant, and which the plain-
15 tiff has prayed may be inquired of by the country, does the like.

GOUDY, GREEN & GOUDY,
Defendant's Attorneys.

And afterwards, to wit, on March 26th, A. D. 1892, being one of the days of the March term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. VEHMEYER
vs. } 131,807. Debt.
JACOB FORSYTH.

On motion of defendant's attorney, it is ordered that leave be, and is hereby, given the defendant to amend the third plea filed herein, and leave is given the plaintiff to withdraw the first replication thereto and amend the replication to the defendant's second plea and the second replication to the defendant's third plea filed in said cause, and leave is also given said defendant to withdraw *to* demurrer to said first and second replications, and is hereby required to rejoin to said amended replications within ten days from this date.

16 And afterwards, to wit, on April 6, A. D. 1892, there was filed in the office of the clerk of said court a certain rejoinder to amended replication, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

JACOB FORSYTH *ads.* HENRY F. T. VEHMEYER. } Debt.

And the defendant, as to the said replication of the plaintiff to the said second plea of the defendant, and which the plaintiff has prayed may be inquired of by the country, does the like.

And the defendant, as to the second replication of the plaintiff to the said third plea of the defendant, says that plaintiff ought not, by reason of anything in that replication alleged, to have his aforesaid action against him, the defendants, because he says that the action wherein the judgment mention- in the plaintiff's declaration in this case was recovered against said defendant was not
17 brought by the plaintiff against defendant in the said superior court of Cook county to recover damages claimed by the plaintiff in said action to have been sustained *he* said plaintiff by reason of the alleged fraud claimed to have been practiced by defendant upon said plaintiff, *has* in said replication alleged; and that the said action and the right to recover therein were not founded upon said alleged fraud of said defendant, or upon any alleged fraud whatever; and that issue was not joined in that action upon the material allegations so made by said plaintiff therein in respect to said fraud, and that trial by a jury was not had therein and a verdict upon the issues was not rendered therein in favor of the plaintiff and against the defendant for the sum of eight hundred and thirty-three and $\frac{3}{100}$ dollars as the damage which had been sustained by said plaintiff by reason of the said alleged fraud of the defendant, in manner and form as the plaintiff has in said replication alleged; and the defendant denies that the judgment set forth in the above replication was entered or rendered by said superior court of Cook county upon said verdict aforesaid, and denies that it was, as aforesaid, found solely upon fraud practiced by the defendant, as aforesaid, upon plaintiff; and plaintiff denies that said judgment in the said declaration of the plaintiff set forth *in* a debt or claim which is by the said act in this defendant's third plea mentioned excepted from the operation of the discharge in bankruptcy which is by this defendant in his said third plea pleaded and set
18 forth in manner and form as the plain- has in said replication alleged; and the defendant denies that he was not by virtue of his said alleged *dei*charge in bankruptcy in his said third plea pleaded discharged from the debt or claim or judgment mentioned and set forth in plaintiff's declaration herein in manner and form as the plaintiff in his said replication alleged; and of this the defendant puts himself upon the country, etc.

GOUDY, GREEN & GOUDY,
Defendant's Attorneys.

And afterwards, to wit, on January 16th, A. D. 1894, being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On the agreement of the parties to this suit, now here made in open court, this cause is submitted to the court for trial without a jury, and the court, now hereafter hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff, and that there is now due and
19 owing from the defendant and to the plaintiff t-e sum of eight hundred and thirty-three dollars and thirty-five cents, and assesses the plaintiff's damages at the sum of eleven hundred and one dollars and sixty-five cents.

Whereupon the defendant submits herein his motion for a new trial in said cause.

And afterwards, to wit, on February 21, A. D. 1894, being one of the days of the February term of the superior —, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

This cause coming on to be heard upon the defendant's motion, heretofore entered herein, for a new trial in said cause, after arguments of counsel and due deliberation by the court, said motion is overruled and a new trial denied. Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said debt of eight hundred and thirty-three dollars and thirty-five cents, also his said damage of eleven hundred and one dollars and sixty-five cents, in form as aforesaid by the court found due and assessed, together with his costs and charges in this behalf expended, and have execution therefor.

Debt.....	$833 35
Da's.....	1,101.65
Entire..	

20 Wherefore the defendant, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed on filing his appeal bond herein in the sum of three thousand dollars, to be approved by the court, together with his bill of exceptions, to be filed within ten days from this date.

"NOTE."—"Mandate not found among the files."

And afterwards, to wit, on January 2nd, 1895, being one of the days of the January term of the superior court, the following, among

other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On motion of defendant's attorney, the plaintiff having been duly served with notice of said motion, it is ordered that this cause be replaced upon the several dockets of this court pursuant to the mandate filed.

21 And afterwards, to wit, on January 31, A. D. 1895, being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On motion of plaintiff's attorney, it is ordered that leave be, and is hereby, given the plaintiff to file an amended declaration herein instanter, and the defendant required to plead thereto within ten days from this date.

And on the same day and year last aforesaid there was filed in the office of the clerk of said court a certain amended declaration, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss*:
Cook County,

In the Superior Court of Cook County, to the March Term, 1891.

22 Henry F. T. Vehmeyer, plaintiff in this suit, by M. W. Robinson, his attorney (by this his amended declaration filed herein by leave of court), complains of Jacob Forsythe, defendant in a plea of debt—

For that whereas the plaintiff, in the July term of said court, in the year 1871, to wit, on or about the 29th day of July, in the same year, by the consideration and judgment of said court, recovered against the defendant in a certain action upon the case the sum of eight hundred and thirty-three and $\frac{35}{100}$ dollars damages, and also the costs of the plaintiff in that behalf, taxed at, to wit, the sum of six and seventy-five hundredths dollars; whereof the defendant was convicted, as by the record thereof which was remaining until the destruction of such record by fire in October, 1871, and did more fully appear; and which judgment still remains in full force.

And the plaintiff avers that the said record of said judgment was wholly destroyed by fire on, to wit, October 9th, 1871, at, to wit, the county aforesaid, and that said record is not and was not at the time of the commencement of this suit in existence.

Yet the defendant has not paid to the plaintiff the said sum of money so recovered by him, as aforesaid, together amounting to, to wit, the sum of eight hundred and forty and $\frac{10}{100}$ dollars, or any part thereof, but refuses to do so, and therefor- he brings his suit, etc.

By M. W. ROBINSON,
Attorney for Plaintiff.

23 And afterwards, to wit, on February 15th, A. D. 1895, there was filed in the office of the clerk of said court a certain demurrer to declaration:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

JACOB FORSYTHE } Debt.
ads.
HENRY F. T. VEHMEYER. }

And the defendant, by F. W. Tourtellotte and F. J. Tourtellotte, his attorneys, comes and defends, etc., when, etc., and says that the said declaration and each count thereof and the matter- therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action, and that he, the defendant, is not bound by law to answer the same; and this he is ready to verify.

Wherefor- for want of a sufficient declaration in this behalf the defe-dant prays judgment and that the plaintiff may be barred from maintaining his aforesaid action, etc.

F. W. & F. J. TOURTELOTTE,
Attorneys for Defendant.

24 And afterwards, to wit, on February 20th, A. D. 1895, being one of the days of the February term of the superior court, the following, among other, proceedings were had and entered of record on said court, to wit:

HENRY F. T. VEHMEYER } 131,807. Debt.
vs.
JACOB FORSYTHE. }

On the agreement of the parties *of* this suit, now here made in open court, it is ordered that the demurrer to the plaintiff's amended declaration filed in said cause be, and it is hereby, withdrawn, and the defendant's second and third pleas heretofore filed to the plaintiff's original declaration to stand to said amended declaration, and leave given to the plaintiff to file an amended replication to said second plea instanter, and the defendant required to rejoin thereto within ten days from this date.

And on the same day and year last aforesaid there was filed in the office of the clerk of said court a certain amended first replication to 2nd plea, which is in the words and figures as follows, to wit:

25 STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County, to the March Term, A. D 1891.

HENRY F. T. VEHMEYER }
vs. } Debt.
JACOB FORSYTHE. }

Amended Replication.

And the plaintiff for replication to the plea of the defendant by him secondly above pleaded says *preclude non*, etc., because he says that there was prior to and until the time of the destruction thereof by fire, as in said declaration alleged, remaining in the said superior court of Cook county such record of said recovery in the said superior court of Cook county aforesaid, as he had above in his said declaration alleged, and that although said record was destroyed by fire, as he has above in his said declaration alleged, and the said record is not and was not at the time of the commencement of his said suit in existence, yet the said judgment was then and still remains in full force; and this he prays may be enquired of by the country, etc.

By M. W. ROBINSON,
Att'y for Plaintiff

26 And afterwards, to wit, on March 21st, A. D. 1895, being one of the days of the March term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER }
vs. } 131,807. Debt.
JACOB FORSYTH. }

On the agreement of the parties to this suit, now here made in open court, it is ordered that defendant's rejoin-er to the plaintiff's original replication to the defendant's second plea filed in said cause stand as a rejoin-er to the amended replication to said plea.

And afterwards, to wit, on January 28th, 1896, A. D., being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. VEYMEYER }
vs. } 131,807. Debt.
JACOB FORSYTH. }

On motion of defendant's attorney, it is ordered that leave
27 be, and is hereby, given the defendant to file an additional plea herein instanter.

And afterwards, to wit, on the same day and year last aforesaid, there was filed in the office of the clerk of said — a certain additional plea, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

In the Superior Court of Cook County.

JACOB FORSYTH
ads.
HENRY F. T. VEHMEYER.

And the said defendant, by Thomas J. Merrifield and Olds & Griffin, his attorneys, now comes and for a further plea in this behalf the said defendant says that he admits that at the July term of the said court, in the year 1871, to wit, on or about the 29th day of July, in the same year, by the consideration and judgment of said court the plaintiff recovered against the defendant in a certain action upon the case the sum of eight hundred and thirty-three and $\frac{35}{100}$ dollars damages, and also the costs of the plaintiff in that behalf, taxed at, to wit, the sum of six and seventy-five one hundredths dollars, whereof the defendant was convicted, as in said plaintiff's declaration alleged; but the said defendant says that the plaintiff ought not to have and maintain his said action against this defendant
28 for the reason that afterwards, to wit, in the year 1871, the said plaintiff caused to be issued and delivered to the sheriff of said Cook county, *of* Illinois, an execution on said judgment against the body of the said defendant and caused him, the said defendant, to be arrested and taken to custody and imprisoned by the sheriff of said county on said execution, and thereupon, in the year 1871, the said defendant filed and presented his written petition and application to the judge of the county court of Cook county, Illinois, asking that he be discharged from such arrest and imprisonment, and gave reasonable and proper notice to the plaintiff and his attorney and agent, at whose instance he was arrested and imprisoned, and to the sheriff who made said arrest; that at the time appointed in such notice the sheriff and officer having the said defendant in custody conveyed him before the judge of the county court of the said Cook county, Illinois.

That at the time and place set for hearing before the county court of said Cook county, Illinois, the said plaintiff and his attorney appeared and contested the discharge of the said defendant, and thereupon said cause was heard, and said court adjudged and decreed that the said defendant was not guilty of fraud, and that he be and he was required to file a full, fair, and complete schedule of his estate, real and personal, including moneys, notes, bonds, bills, obligations, and contracts for money or property of any and every description or kind, name or nature whatsoever, together with a true and perfect account of all the debts which he was at the time owing, and that he subscribe to an oath

as provided by statute in such proceedings, and that upon so doing he be discharged from custody and arrest under said execution, and that thereupon said defendant did file such
29 schedule, as he was ordered and decreed by said county court to file, and subscribed and swore to the same, as required by statute; whereupon he was by said court discharged; and the defendant says that in said proceedings in said county court of Cook county, Illinois, it was held, adjudged, and decreed in said cause that said judgment was not rendered for — on account of *hand* or deceit practiced by the said defendant, but for and on account of an indebtedness then existing from the defendant to the plaintiff, and against which the said defendant was entitled to schedule; that said judgment and decree is still in full force, not *approved* from, reversed, or set aside, and he says all of the pleadings, papers, and files and records of every character in connection with said cause in said county court were wholly destroyed by the fire on the 9th day of October, 1871, at the county aforesaid, and said records is not and was not at the time of the commencement of this suit in existence, nor was any copy thereof, to the defendant's knowledge.

And the defendant further says that on the 13th day of December, 1880, the district court of the United States for the district of Indiana granted to said defendant a certain discharge in these words and figures, to wit:

In the District Court of the United States for the District of Indiana.

In the Matter of JACOB FORSYTH, Bankrupt. In Bankruptcy. 3292.

30 DECEMBER 30, 1880.

Whereas Jacob Forsythe has been duly adjudged bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in that behalf:

It is therefore ordered by the court that said Jacob Forsyth be forever discharged from all debts and claims which by said act make provable against his estate, which existed on the 30th day of August, 1878, on which day the petition for adjudication was filed by him, excepting such debt-, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

And that the said debt existing in favor of the said plaintiff against this defendant was provable against the said defendant in his proceedings in bankruptcy; and this the defendant is ready to verify.

Wherefore he prays for judgment if the plaintiff ought to have his aforesaid action against him.

THOMAS J. MERRIFIELD &
OLDS & GRIFFIN,
Att'ys for Def't, Jacob Forsyth.

And afterwards, to wit, on January 30, 1896, there was filed in the office of the clerk of said court a certain demurrer to additional plea, which is in the words and figures as follows, to wit:

31 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, of the January Term, 1896.

HENRY F. T. VEHMEYER }
vs. } Debt.
JACOB FORSYTHE. }

And the plaintiff, as to the plea of the defendant by him filed on January 28th, 1896, by leave of the court, as an additional plea to plaintiff's declaration, says that the same and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the said plaintiff, from having his aforesaid action, and that he is not bound by law to answer the same; and this he is ready to verify; and the plaintiff shows to the court here the following causes of demurr- to the said above-mentioned plea, to wit:

1st. That said plea is double and presents and tenders more than one issue.

2nd. That said plea, so far as it sets up any matter of defense other then has already been pleaded to plaintiff'- said declaration, sets up matter- that are wholly irrelevant and immaterial to the issues in said case and which constitute no defense to said plaintiff's declaration, and the matters so pleaded are a departure from the
32 issues made by the declaration and other pleadings already pleaded in said case.

3rd. That which said plea purports to set up as a defense to said declaration a judgment of the county court of Cook county, it, the said plea, does not in manner or form set forth such judgment with particularity or certainty, and does not by reference or otherwise present any such judgment as a bar to the plaintiff's said action, but the matters in said plea relating to said judgment are argumentative only; and also for that said plea — in other respects uncertain, informal, and insufficient.

Wherefore, for want of a sufficient plea in this behalf, the plaintiff prays judgment and his damages, etc., to be adjudged to him, &c.

By M. W. ROBINSON,
Att'y for Plaintiff.

And afterwards, to wit, on February 15th, A. D. 1896, being one of the days of the February term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

33 HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

This cause coming on to be heard upon the demurrer to the defendant's additional plea, filed in said cause January 28th, A. D. 1896, after arguments of counsel and due deliberation by the court, said demurrer is sustained.

And afterwards, to wit, on January 29th, A. D. 1897, being one of the days of the January term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

On motion of defendant, it is ordered that Mer-field and Hall be, and — hereby, substituted as attorneys for defendant in lieu of F.W. & F. J. Tourtelotte, withdrawn.

And afterwards, to wit, on June 24th, A. D. 1897, being
34 one of the days of the June term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTHE. } 131,807. Debt.

On the agreement of the parties to this suit, now here made in open court, this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff, and that there is now due and owing from the defendant to the plaintiff the sum of eight hundred and thirty-three dollars and thirty-five cents debt, and assess the plaintiff's damages at the sum of two thousand and seventy-six dollars and ninety cents; whereupon the defendant enters herein his motion for a new trial in said cause. After arguments of counsel and due deliberation by the court, said motion is overruled and a new trial denied.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said debt of eight hundred and thirty-three dollars and thirty-five cents, and also his said damages of two thousand and seventy-six dollars and ninety
35 cents, in form, as aforesaid, by the court found due and assesses, together with his costs and charges in this behalf ex-

Debt.....	$833.35
Da's	2,076.90
Entire ..	

pended, and have execution therefor. Whereupon the defendant, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and for the first district of Illinois, which is allowed on fixing his bond in the sum of twenty-five hundred dollars, to be approved by the clerk of this court, within twenty days from this date, and leave given said defendant to file his bill of exceptions within thirty days from this date.

And afterwards, to wit, on July 23rd, A. D. 1897, being one of the days of the June term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

HENRY T. F. VEHMEYER
vs.
JACOB FORSYTH. } 131,807. Debt.

On the agreement of the parties to this suit, now here made in open court, it is ordered that the time for filing the bill of exceptions herein be, and — hereby, extended five days.

36 And afterwards, to wit, on July 28th, A. D. 1897, there was filed in the office of the clerk of said court a certain stipulation, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, }
County of Cook, } *ss*:

In the Superior Court of Cook County.

VEYMEYER
vs.
FORSYTH. } Case No. 131,807.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by and through their respective attorneys, that the bill of exceptions now on file in said cause may be incorporated in the transcript of the record to be used in the appeal heretofore taken to the appellate court in and for the first district of Illinois in lieu and instead of a copy thereof, and that said transcript, containing said original bill of exceptions, shall have the same force and effect in said appeal to said appellate court in like manner as if a copy of said bill of exceptions were incorporated in said transcript.

37 ## 131,807. Superior court. Vehmeyer *vs.* Forsyth. Stipulation *re* original bill of exceptions. Filed Jul- 28, 1897. John A. Luhm.

38 Dated Chicago, Cook county, Illinois, July 28th, 1897.

M. W. ROBINSON,
Att'y for Plaintiff.
THOMAS J. MERIFIELD &
ROBERT G. HALL,
Att'ys for Defendant.

(See # #.)

And heretofore, to wit, on July 27th, A. D. 1897, there was filed in the office of the clerk of said court a certain bill of exceptions, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

HENRY F. T. VEHMEYER
vs.
JACOB FORSYTH. } No. 131,807.

Bill of Exceptions.

39 Be it remembered that on the trial of the above-entitled cause, at the June term, A. D. 1897, to wit, on the 18th day of June, A. D. 1897, the same being one of the days of said term of said court, said cause came on for hearing before Jonas Hutchinson, one of the judges of said court, upon the pleadings before that time filed in said cause, M. W. Robinson appearing on behalf of said plaintiff and Thomas J. Merrifield and Robert G. Hall appearing on behalf of said defendant, and thereupon, by agreement of counsel, trial by jury was waived and said cause was submitted to the court for trial without a jury; and thereupon the plaintiff, to maintain the issues upon his part, introduced the following evidence, to wit:

JAMES FRAKE, a witness called and sworn *and* behalf of the plaintiff, testified as follows:

Direct examination by Mr. ROBINSON:

Q. What is your name?
A. James Frake.
Q. What is your occupation?
A. I am a lawyer, and have been since 1869 practicing attorney in Chicago, Cook county, Illinois.
40 Q. What was your business in 1871?
A. I was an attorney-at-law.

Q. Do you know anything in regard to an action brought by Vehmeyer, the plaintiff in this suit—Henry F. T. Vehmeyer—against Jacob Forsythe, the defendant in this suit, in 1870.

A. I do. The action was brought in 1870. I was then the partner of one Buschnell, under the firm name of Buschnell & Frake, and I conducted the suit.

Q. Did you bring that suit?

A. I brought it.

Q. Did you at that time keep a docket?

A. I did.

Q. A- that time, during the progress of this matter, did you make any entries in your office docket of the steps taken in that proceeding?

A. I did.

Q. Have you got that docket?

A. I have.

Q. Will you refresh your recollection to refer to that docket?

A. In some matters it would.

Q. You have that docket now in your hand?

A. I have.

Q. It is the original book?

A. It is the original book.

Q. Were the entries made at the time?

A. Yes, sir.

Mr. HALL: I object to his refreshing his recollection unless this is a memorandum made for that purpose by himself.

The COURT: Did you make those entries?

A. Yes, sir; I made every one of them.

Mr. ROBINSON:

Q. They are all in your handwriting?

A. Yes, sir.

The COURT: There is an objection here. If he can state all that the dockets contain without having examined it, his recollection entirely aside from the docket, why, then he should state
41 but if what he says he gets from the docket, why, then the docket may be used. He may recollect some of it and some not.

Mr. ROBINSON: Have you an independent recollection of these facts, or is your recollection largely derived from reference to your docket?

A. The kind of a case and the name of the party I have a perfectly independent recollection of.

Q. Now, then, you may state the names of the party to that suit.

A. Henry F. T. Vehmeyer—he was the plaintiff—against Jacob Forsythe, defendant; an action brought in the superior court and an action on the case. General No. I would have no definite recollection of.

Q. You may state any fact that assists to refresh your recollection about its being an action in the case.

A. Mr. Vehmeyer came to me—I remember him—and said——

Mr. HALL: I object to what he said.

The COURT: That is all right so far.

The WITNESS: He stated his case to me and stated——

Mr. HALL: I object.

The WITNESS: It came to my knowledge that an action against Mr. Forsythe in an action of assumpsit was worthless and could not be enforced.

Mr. HALL: I object to that as immaterial and move that that be stricken out.

The WITNESS: That is the fact.

The COURT: It may be stricken out.

The WITNESS: This action I determined to bring in case because from the facts an action of fraud and deceit was clearly main-
42 tainable. The declaration was drawn in case and a declaration containing one count was filed.

The COURT: There is a part in that answer that is incompetent.

Mr. ROBINSON: Did you bring the action?

A. I brought the action.

The COURT: Let that part where it says "an action of fraud and deceit was clearly maintained" be stricken out.

The WITNESS: I drew the declaration of one count.

Mr. ROBINSON: Do you remember the contents of the declaration?

A. Well, I remember the substance.

Q. Did you file it?

A. I drew the declaration and filed it. The general issue was pleaded to that declara-ion.

Q. By reference to any memorandum you have in mind, can you state when you filed that declaration?

The COURT: Have you an independent recollection of it?

Mr. ROBINSON: Have you an independent recollection, aside from that?

The COURT: Now, what we want is his independent recollection of these matters.

Mr. ROBINSON: Have you an independent recollection, aside from the declaration filed?

A. As to the date of when the suit was commenced and the date it showed I filed the declaration, I would not have an independent rec-llection of that.

Q. Did you make a memorandum in your book of those dates?

A. I did.

Q. Will you please refer to them, the date when that suit
43 was brought and the date when you filed your declaration?
A. The suit was brought on the — day of July, 1870. The declaration was filed on the 21st day of July, 1870.
Q. Can you produce a substantial reproduction of that declaration?
A. I can.
Q. Please do so.

Mr. HALL: I object to that, if the court please.

The COURT: We will have to find out a little about it.
Mr. ROBINSON: Have you any copy of that declaration?
A. I have not a copy of the declaration.
Q. Do you know what became of the original files of that case?
A. The original files of that case, with all the files of the superior court of Cook county, were burned on the morning of October 9th, 1871. I was downtown and I saw them burn.
Q. You have a personal knowledge of that fact?
A. Yes, sir.
Mr. HALL: How do you know that?
A. I saw the contents of this court-house from top to bottom burn—not this court-house, but the court-house that stood on this place—burned with all the records.
Mr. ROBINSON: The records were kept in the vaults at that time?
A. The record- were kept in the vaults. I saw the whole contents of the court-house go. I examined the vault, I think, Monday night.
Q. You saw the condition of the vault?
A. Yes, sir; after the fire.
Q. Is it possible to produce an original declaration?
44 A. It is not.
Q. Nor any copy of it?
A. It is not.
Q. Did you preserve any copy made at the time?
A. I did not.
Q. Do you know what sort of a declaration you made?
A. I do.
Q. What is the form of the declaration?

Mr. HALL: I object to that.

Mr. ROBINSON: I will ask him this. (To the witness:) I will ask you to reproduce as fully and completely as you can the contents of the declaration filed by you in that case.
A. I have done it and written it out here and hold it now in my hand.

Mr. HALL: I object to that.

Mr. ROBINSON: I ask to offer that. I ask you to state what that is you hold in your hand.
A. It is a copy of or reproduction of the original declaration in the case of Jacob Forsythe or Henry F. T. Vehmeyer against Jacob

Forsythe, filed in the superior court on the 21st day of July, 1870.

Q. I will ask you to state substantially whether it is a copy of that declaration.

A. It is, to the best of my knowledge and belief and recollection.

The COURT: When did you make it?

The WITNESS: It was made some time before the last trial of this case.

The COURT: Well, when—about when?

A. Well, I should say about a year before the trial.

The COURT: About when?

A. Three or four years ago.

45 Mr. ROBINSON: About four years ago?

A. Yes, sir.

Q. I guess it was made some time in the fall of 1893?

A. Along there.

Mr. ROBINSON: It does not pretend to be a copy made from and by comparison with the original. It pretends to be from his personal recollection of what that declaration was, and put in that form.

The COURT: He may state his best recollection.

To which ruling of the court the defendant, by *its* counsel, then and there duly excepted.

Mr. ROBINSON: Go on and state your best recollection of what that declaration contained.

Mr. HALL: But not with reference to that document (referring to the paper held by witness).

The COURT: His reproduction of that declaration?

Mr. ROBINSON: Yes. (To the witness:) Give as near as you can the contents of the declaration.

A. I would prefer to stop and think about the declaration I drew.

The COURT: Did you draw it?

Mr. ROBINSON: Did you draw it with the use of a form book?

A. I did.

Q. What form book?

A. Puterbaugh's, I remember, and Chitty were the books I used.

Q. Go ahead and let us see how well you get along with the ordinary form of a declaration. Did you follow the forms contained in the form book you used for the purpose of drawing the declaration?

A. I did.

46 Q. Would it aid your memory if you had that form book before you?

A. It would, decidedly.

Q. Have you got Puterbaugh's here?

A. I have not.

Q. Did you prepare it from Puterbaugh?

A. I did.

Q. The papers you have before you, was that prepared from some form you used before?

A. I believe it to be.

Q. You may go ahead now. You say that was prepared from the

form, so far as the formal parts are concerned. Refresh your recollection and state to us in that way the contents of the declaration.

Mr. HALL: That is objected to.

The COURT: He may answer.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

A. It would be: "Superior court of Cook county, to the July term, or of the August term, 1870. County of Cook and State of Illinois. Henry F. T. Vehmeyer, by Buschnell & Frake, his attorneys, plaintiffs, complains of Jacob Forsythe, defendant, summoned, etc., in a trespass on the case, for that whereas, heretofore, to wit,"——

The COURT: Is it necessary to take up time with the details? I do not think so.

Mr. ROBINSON: Yes. (To the witness:) Go on, rapidly.

The WITNESS: That heretofore, to wit, on the 10th day of August, 1868——

Mr. HALL: I object to his referring to that document he holds in his hand.

The COURT: Look at the document. If there is anything in the document——

The WITNESS: Where I have got a dozen men driving at
47 me I can't do anything. (Continuing:) In order to induce the plaintiff to advance him a large amount of money, to wit, the sum of $1,500, I think the declaration would say——

Mr. HALL: I object. The witness is reading from his document again.

The WITNESS: I was not.

The COURT (to the witness): Just close that.

The WITNESS (continuing): $1,200, falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord-wood, to wit, the sum of 200 cords, cut and piled up near the Pittsburg and Fort Wayne, or, I should say——

Mr. ROBINSON: That's right.

Mr. HALL: Let the witness testify.

The WITNESS: The Pittsburg and Fort Wayne, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that said wood was contracted, or rather, perhaps, one Eldridge had contracted, to purchase said wood at $6.00 per cord in the city of Chicago when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5.00 per cord for the 200 cords of wood he, defendant, would immediately——

Mr. ROBINSON: Who would?

Mr. HALL: I object to that—to the counsel prompting the witness.

The WITNESS: Well, he, the defendant, would immediately
48 ship said cord-wood to the city of Chicago.

Mr. MERRIFIELD: Your honor, he is looking at the paper again.

The COURT: He has got it folded up.

Mr. HALL: He is getting it in evidence just the same.

The WITNESS: I didn't. What's the use of telling me that? That the plaintiff Vehmeyer, relying upon these representations as being true, advanced to the plaintiff——

Mr. ROBINSON: To the defendant.

WITNESS: To the defendant.

Mr. HALL: I object.

Mr. ROBINSON: It is a mere slip of the tongue.

Mr. HALL: Well, you should not prompt him.

The WITNESS (continuing): Advanced to the defendant the said sum of—I think the declaration said the sum of $1,200 or $1,000; that the said defendant shipped only the sum of forty cords of wood to the said Eldridge, from which the said Vehmeyer received the sum of $6 per cord. I don't know whether it is right or not.

Mr. ROBINSON: Was there any allegation of fraud and deceit?

The WITNESS: That the representations of the defendant falsely—were false and fraudulent; that he did not have nor never did have in the county of Lake and State of Indiana 200 cords of birch wood, piled up, ready for shipment to the city of Chicago, to sell said Eldridge, but only had—neither in the county of Lake or anywhere else—but only had the sum of forty cords of birch wood, which was shipped by the said defendant to the said Eldridge.

49 Mr. ROBINSON: Well, did you allege damages?

(Witness consulting paper.)

Mr. HALL: I object to his referring to the paper.

The COURT: Did you say anything about the damages?

Mr. HALL: He is looking at the paper again.

The COURT (to the witness): I won't have you use that again; I will get that out of the realm of controversy.

The WITNESS (continuing): Wherefore the defendant was therein——

Mr. ROBINSON: The defendant? The plaintiff, you mean?

The COURT: That's not competent.

Mr. ROBINSON: It is just a mere slip of the tongue.

The COURT: I know it, but the proper way is to stop him and ask questions and find out.

Mr. ROBINSON: Do you recollect what damages were alleged?

The WITNESS (continuing): Wherefore the plaintiff was damaged to the extent of $1,500 was the amount that was alleged in the declaration, and thence he brings this action of fraud and deceit against the defendant.

Mr. HALL: I object to all of the statements of the witness pretending to make up an alleged declaration in this case, as he had recited them, on the ground that it simply purports to be a substantial copy made from the recollection of the witness some twenty years after the alleged declaration was filed.

The COURT: That objection is overruled.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

50 Mr. ROBINSON: Do you remember whether there was one or more counts in the declaration?

A. There was only one count in the declaration; of that I am certain.

Q. Do you remember whether the defendant pleaded to the declaration?

A. He did.

Q. Do you remember what the plea was?

A. The plea was not guilty.

Q. Was there any other issue in that case?

A. No, sir.

Q. Do you remember the circumstance of that case being tried?

A. I do, well.

Q. Can you state the date of the trial?

A. Only by reference to my memorandum book.

Q. Well, refer to that and tell us when the verdict was rendered?

A. The verdict was rendered on the 9th day of May, 1871.

Q. I will ask you to state whether that verdict or any other record or proceedings in that case are now in existence.

A. No, sir.

Q. What became of them?

Mr. MERRIFIELD: If you know, if the court please.

The COURT: Yes.

The WITNESS: I saw them burn.

Mr. ROBINSON: Is it possible to produce that verdict or the record of the judgment?

A. No, sir.

Q. Did you see that verdict?

A. I did.

Q. Did you know what the verdict was; can't you give its contents?

A. Yes, sir.

51 Q. State it.

Mr. HALL: I object on the ground that he is attempting to restore this record at this time, and on the further ground that it should have been restored before this suit was brought.

The COURT: The objection is overruled.

To which ruling of the court defendant, by *its* counsel, then and there duly excepted.

The WITNESS (continuing): We, the jury, find the defendant guilty, and assess the plaintiff's damages at $833.35, and signed by the foreman of the jury.

Mr. ROBINSON: What other proceeding at that time—whether there was a motion for a new trial?

The WITNESS: Defendant entered a motion for a new trial in the case.

Q. Do you know when that was disposed of and the judgment rendered?

A. Yes, sir.

Q. Give the date.

A. On the 29th day of July, 1871.

Q. Now, do you know what the judgment—what the record of the judgment of the court that was rendered at that time?

A. I do. I think I do, at least.

Q. Did you see it before the destruction of the record?

A. I did.

Q. You may state the circumstances under which you saw it—how you happened to see it.

A. Nearly, perhaps, a month or more after the verdict was rendered or the judgment was rendered I went to the clerk, George Gary, and wanted a writ on which I could arrest Jacob Forsythe on the judgment, and he said——

52 Mr. HALL: I object to what he said.

The WITNESS (continuing): Well, he and I went together and we examined the files and record of that judgment, and I saw the judgment at that time, and the writ was issued.

Mr. ROBINSON: Can you now, from what you then saw, state what the judgment was?

A. I can, substantially.

Mr. HALL: I object to his stating the contents of it substantially.

The COURT: You may state so far as you recollect.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

A. Henry F. T. Vehmeyer, plaintiff, *vs.* Jacob Forsythe, defendant. Case. This day came on to be heard the motion of defendant to set aside the verdict aforesaid and for a new trial of said cause; — was argued by counsel, and the court being fully advised in the premises, doth overrule said motion. Therefore it is ordered by the court.

Mr. ROBINSON: Considered.

Mr. HALL: I object to that.

The COURT: Yes; it is not proper. I sustain the objection.

The WITNESS (continuing): Therefore it is considered by the court that the plaintiff have and recover from the said defendant his said damages, $833.35, in form as assessed by the jury aforesaid, together with his costs in this behalf expended, and that he have execution therefore.

Mr. HALL: I move that the answer be stricken out on the ground it is attempting to give the contents of the record, and that
53 the record should have been restored before this suit was commenced—the same objection as has been made before.

The COURT: Save your point.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. ROBINSON: I will ask you to state whether or not any process was issued at that time.

A. Yes, sir; there was.

Q. Do you know what it was?
A. A *capias ad satisfaciendum.*
The COURT: Did you see the writ?
A. I saw the writ; took the writ and gave the writ to the sheriff of Cook county, and also gave him $5, or a little less than $5—$4.35 or 55 cents: I can't recollect the exact figures; I know what the fee was at that time.
Q. State any facts you know in regard to the execution of that writ.
A. Subsequent to that writ, in about the middle of September, I should say, Mr. Forsythe was arrested and placed in jail—Jacob Forsythe.
Q. The defendant?
A. The defendant.

Cross-examination by Mr. HALL:

Q. When did you last see the records and files in this case that was brought in 1870?
A. It was some time—it was the day that the writ was issued.
Q. What day was that?
A. Well, I can't give you the exact date of it. I didn't make a memorandum of that date.
54 Q. How long prior to the great Chicago fire, October 9th, 1871, was it?
A. Yes, sir.
Q. How long prior to that?
A. Well, it was in August or September prior to the fire in 1871.
Q. Do you know whether it was in August or September; which was it?
A. I should say it was in August; that would be my best recollection.
Q. In the fore part of August or the latter part of August?
A. I should say in the latter part of August.
Q. What records or files did you see at that time?
A. I saw the entire files and saw the judgment-docket record.
Q. State what files you saw.
A. I saw the files in the case—the declaration, the general issue, the verdict, the instructions to the jury.
—. What record did you see?
A. I saw the judgment record.
Q. The judgment records?
A. Yes, sir.
Q. Didn't you you testify on the former trial of this case that you examined the judgment docket with the clerk?
A. Yes, sir; and that is what I mean now when I said judgment record; I mean judgment docket.
Q. Did you not testify you examined the judgment record?
A. The judgment record?
Q. Yes.
A. I examined that instrument—that book that had the judgment written up in it.

Q. The judgment written up in it?
A. Yes; whatever you call it. I don't know what you call it.
Q. Where did you examine that record?
55 A. In the court-house, in the clerk's office.
Q. In the clerk's office or in the vault?
A. I can't tell.
Q. You don't know which?
A. It was in the custody of the clerk.
Q. After you had seen the files and record of this case in August, 1871, did you see any of them after that date?
A. No, sir.
Q. Do you remember when the fire—that great fire was?
A. I remember it very well, sir.
Q. What was the date?
A. It commenced on Sunday night, October 8th, and completed on Monday, October 9th, 1871, and never do I want to see another.
Q. Do you know personally whether the records in this case were in the court-house in Chicago at the time of the fire?
A. I know nothing except that the entire records of the superior clerk's office, from stem to stern, that was in the court-house at that time was destroyed, for I saw them burned, and examined the court-house the next day.

Mr. HALL: I move to strike out, because it is not responsive. I asked him whether he knows personally whether the record of this case was destroyed in the fire of 1871.
The COURT: Answer yes or no, and then you may make any explanation you wish to.
A. I do not know personally that these records were burned, except that the contents of the superior clerk's office, with all of their records, were burned. That part of it I do know.
Q. Mr. Frake, were you attorney of record in this case originally?
A. What do you mean by this case?
56 Q. Were you the attorney in this case in 1870?
A. I was myself, and Mr. Bushnell, under the name of Buschnell & Frake.
Q. Did you bring this suit in 1890?
A. I did. This present suit?
Q. This *this* present suit.
A. I did; yes, but I have had nothing to do with it since I brought the case.
Q. How long after the judgment was entered before you brought this suit?

Mr. ROBINSON: I object. It is a matter of computation.

The WITNESS: A little less than twenty years.
Mr. HALL: A little less than twenty years?
A. Yes, sir.
Q. During that period have you examined the facts in this case or talked them over?
A. Yes. Mr. Vehmeyer had for five or six years been drumming

at me to bring this suit, and like a lawyer that has been very busy I neglected to bring it.

Q. You waited for nineteen years before bringing this suit?

A. No, sir.

Q. How long did you wait?

A. I waited five years after, I think, Mr. Vehmeyer told me to bring it.

Q. Have you any specific interest in any judgment that may be recovered in this case?

A. No, sir.

Q. Have you any arrangement with Mr. Vehmeyer for the amount of fees you are to get out of it?

A. No, sir; none whatever.

Mr. HALL: That is all.

57 Redirect examination by Mr. ROBINSON:

Q. I will ask you why the bringing of this suit was delayed so long.

A. Mr. Forsythe was considered execution-proof until after his wife died.

Mr. HALL: I object.

Mr. ROBINSON: I withdraw the question.

Mr. HALL: I object to his withdrawing it.

The COURT: Well, then, let it stand. Do you object to the question being withdrawn and the answer excluded?

Mr. HALL: I want the record to show it.

The COURT: To show what?

Mr. HALL: The questions of counsel and the answers of the witness.

The COURT: Well, the counsel says he withdraws the question and moves that the answer be stricken out. Do you object to it?

Mr. HALL: No.

Whereupon the furthe- taking of testimony was continued until 2 p. m.

CHICAGO, *June 18th*, 1897.

R. R. STEVENS, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. ROBINSON:

58 Q. What is your name?

A. R. R. Stevens.

Q. What is your present employment?

A. I am engaged with the Security Title and Trust Co., abstract-makers.

Q. What was your business in the summer of 1871?

A. I was engaged with Chase Brothers & Company in the same business.

Q. How early in 1871 were you occupied in that business?

A. All the year of 1871.

Q. What was the business of Chase Bros. & Co., in which you were engaged?

A. Makers of abstract- of title.

Q. Makers of abstracts for hire for other persons?

A. Yes, sir.

Q. And carrying on that business?

A. Yes, sir.

Q. What was your business in 1870?

A. The same business.

Q. Did you in the course of that employment make any memorandum or entries for the use of that firm relating to a suit wherein this present complainant, Vehmeyer—Henry F. T. Vehmeyer—was plaintiff, and this present defendant, Jacob Forsythe, was defendant?

A. I did.

Q. In the superior court?

A. I did

Q. You may state in what form you made your memorandum and entries.

A. We had books prepared for that purpose.

Q. You mean the firm?

A. Yes; called dockets.

Q. You mean the firm of Chase Bros.?

A. Yes; wherein we entered the title of a case, when it was commenced, the nature of the action, date of commencement, and all subsequent orders that were entered in the case, for our business.

Q. Those, you say, were entered in a book?

A. Yes, sir.

Q. Have you the book of that firm in which you made the
59 entries relating to this case?

A. I have.

Q. Will you please designate how the book is described, the volume, etc.?

A. Volume 18, Judgments of Superior Court, in cases from 30670 to 32334, inclusive.

Q. Will you turn to the page containing the entries made by your relating to that case?

A. Yes, sir.

Q. Upon what page do you find it?

A. 55; vol. 18.

Q. State what there appears in regard to the title of the action.

Mr. HALL: That is objected to.

The COURT: On what ground?

Mr. HALL: I object to the book itself on the ground that it will appear upon examination of the witness that this is not an original entry.

Mr. ROBINSON: I will go back.

Mr. HALL: It is simply a copy.

Mr. ROBINSON: Who made the entries in that book in this case

A. I made them myself.

Q. State whether there were made at the time.
A. Yes, sir; at the time the suit was commenced.
Q. You may state from what source. State the name of the parties to the action as you find it there.
A. Henry F. T. Vehmeyer against Jacob Forsythe.
Q. State what is the number of the case in the superior court.

Mr. HALL: He is testifying from this record and offering it in evidence; to which I object on the ground that it is merely a copy of the original record of the court and it is not the best evi-
60 dence. This is a book belonging to the abstract-makers, and it is not a book kept by the clerk of the court. It is not the best evidence in this case.

Mr. MERRIFIELD: It is incompetent because it is not a copy of the record, but it is a copy of memorandum upon the judgment docket, which is not part of the record on which the suit is founded.

Mr. ROBINSON: What do you find the number of the case?
A. 31053.
Q. What was the form of action?

Mr. HALL: I object to that.
The COURT: In view of the objection, I want him to state from what he made that entry.
Mr. ROBINSON: I intend to follow that immediately afterwards.
The COURT: On that promise, I will let him answer.
To which ruling of the court defendant, by his counsel, then and there duly excepted.
Mr. ROBINSON: I ask you to state what was the form of action.
Mr. MERRIFIELD: The memorandum shows for itself.
The COURT: Of course it will show for itself, but if the book—if you offer the entries, they are in evidence.
Mr. ROBINSON: I offer it now, but it is a book that cannot be accom-odated out of that office.
The COURT: I understand it.
Mr. ROBINSON: I want to get it in the record.
The COURT: The proper way would be to prove the com-
61 petency of that book in evidence, and then offer the entry in evidence, and then let him read the entry.
Mr. ROBINSON: Very well.
The COURT: And then the book speaks for itself.

Mr. ROBINSON (to the reporter): Now, you may scratch out the last question and answer. (To the witness:) From what sources of information do you obtain the matters which you entered in the book as to the title of the case, and as to the number of the case, and as to the form of action?
The COURT: As to all of the entries.
Mr. ROBINSON: They came from different sources. From what source did you obtain those?
A. From the files and records in the office of the clerk of the superior court of Cook county.
Q. Is that true in regard to all of those entries that you made?

A. Yes, sir.

Q. And at what times were they taken from the files and records?

A. At the time the papers were filed and orders entered, the same date.

Q. Who took those entries?

A. I took them myself.

Q. And on what did you take them?

A. I entered them directly into this book.

Q. Directly into that book?

A. If you will allow me to state; I kept all these books at that time in the office of the clerk of the superior court. All the books pertaining to our judgment records were kept in that office.

Q. So that they were obtained from the original source at the time and entered directly into that book at the time?

62 A. Yes, sir.

Mr. ROBINSON: Now, we offer the entries relating to that case taken in the book in evidence.

Mr. HALL: We renew our objection on the same ground stated to the court before: this is a mere copy made from original records in the court; that — is not the best evidence, because it is not the record of the clerk of the court, who is the proper person for keeping them.

The COURT: Ask him where those files are which he examined.

Mr. ROBINSON: Where are the original files from which you took these entries?

A. They were destroyed in the great fire of October 8th and 9th, 1871.

Q. That is, the originals of the entries you made in that book relating to this case?

A. Yes, sir.

Q. Were the originals of the entries you made in that book relating to this case destroyed?

A. Yes, sir.

The COURT: Well, I think I will let it go in evidence.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

The COURT: I will not let him read anything farther than what he has from the entry.

Mr. ROBINSON: I will ask you to state, from your reference to that book and the entries in this case in that book, whether the matter therein stated—memorandum made in regard to matt-rs affecting the case of Vehmeyer against Forsythe—are true?

A. They are.

Q. And whether they truly and correctly represent the files and records of the case.

A. To the best of my knowledge and belief.

63 Q. How long have you been in that business, Mr. Stevens?

A. Since 1854.

Q. You are an old clerk of court, to begin with, are you not?

A. No, sir; but I was clerk in the circuit court from 1878 to 1893.

Q. I will ask you to state whether that book is used by the firm of Handy & Co. in their abstract business, furnishing abstracts for hire.

A. It is.

Q. And whether the entries then made are used as a part of the abstracts of title which they furnished for and titles in Cook county.

A. They are.

Q. I will ask you to state to whom that book belonged; to whom does the book belong?

A. Well, sir——

Q. (Interrupting.) By whom is it kept?

A. It is kept by Handy & Company, or the Title Guarantee & Trust Company. That is a concern now in whose possession the books are.

Q. I will ask you to state if they accom-odate that book out of their office, to be kept or used outside of their office, except for very short intervals of time.

A. This is the first instance I have known them to do it, to my knowledge.

Q. Is it now in the custody and in the charge and keeping of one of their employés?

A. Yes, sir; it is.

Q. In view of the fact that the book is not accom-odated to be left as testimony in this case, I will ask you to state just what it is on the page to which you have referred in this case—the entries made by you in the case.

64 Mr. HALL: I think the court has ruled that what he testified to is all that is admitted. The witness has given a part of the contents of that order as it appears on the book. (To the court:) Did not the court rule that is all you would admit?

The COURT: No; the whole of it is offered, and there is only one way of getting it before me, and that is to read it.

Mr. HALL: Of course, subject to the objections that have been made.

The COURT: Yes.

Mr. ROBINSON: Now, then, commence and state what that book contains—all entries relating to the case in question.

A. Case No. 31053.

Q. Read the title which is there; go right on.

A. Henry F. T. Vehmeyer.

Q. In the column names of parties, do you mean?

A. Yes.

Q. State it as you go along.

A. Under the column of parties, "Henry F. *P.* Vehmeyer *vs.* Jacob Forsythe;" under the heading "action," "trespass on the case;" under the heading of when commenced, "July 16, 1870;" under the heading of date of judgment, "May 9th, '71;" "record and amount, etc., verdict, $833.35;" "motion for a new trial;" under the heading of date of judgment again, "July 29, 1871, motion de-

nied and judgment and appeal allowed." Shall I give books and pages where entries are made?

Mr. ROBINSON: Yes.

65 A. The verdict was rendered in Record No. 2, page 492, of the superior court; the record of judgment was entered in volume 6, page 244. Under the heading of costs, $28.20; under the heading of fee book, Fee Book 40, page 549; under the heading of execution, 16963.

Q. What does that mean—number of execution?

A. Number of writ; yes, sir.

Mr. ROBINSON: Now, have you prepared, Mr. Stevens, and can you furnish, for the purposes of this trial or for the record in this case, a copy showing these entries that are taken in the book?

A. Yes, sir; I have a copy here.

Mr. HALL: I object to the copy.

Mr. ROBINSON: Made for the purpose of this case? I think if counsel were entirely fair they would agree that is a copy, and allow it to go in in place of the original book.

Mr. HALL: I think it is in the record in place of putting the book in.

Mr. ROBINSON: I think it is, but it is perhaps a little more clear as a table. I submit, your honor, that is a fair presentation of evidence for the purpose of a record in this case. Here is a book that cannot be left, and it is a mere matter of delay. The gentlemen themselves can examine them with that paper—the matter that is contained on that page of that book relating to this case.

Mr. HALL: Saving our rights and saving our objections to that, there is no objection to putting in a written copy in the same form as it appears in the book, so that it may appear in the record in that way.

66 Mr. ROBINSON: Will you please examine it yourselves and see if you find it to be exactly as the pages are?

Mr. HALL: This is made by Handy.

Mr. ROBINSON: This is furnished from their books. I suppose the clerk made the entry that, by agreement of counsel, the paper marked Exhibit A is agreed to be a correct copy of the entries in the book referred to, and that Exhibit A may be substituted in evidence for the entries contained on the original book. I believe that is all.

The page herein next following, marked Exhibit A, was thereupon introduced in evidence by the plaintiff.

No. of case.	Names of parties.	Action.	When commenced.	Date of judgment.	Record.	Amo'nt of judgment.	Costs.	Fee book.	No. of execuți'n.	Date of execution.
31,053	Henry F. T. Vehmeyer *vs.* Jacob Forsyth.	Trespass on the case.	July 16, 1870	May 9, 1871 July 29, 1871	2,492. Mo. N. T. mo. deni'd. 6,244.	Verdict. 833.35, and judg't & appeal'd.	28.20	40,549	16,963	Aug. 19, 1871

68 STATE OF ILLINOIS, } ss:
County of Cook, }

Henry H. Handy, being first duly —, on oath states that the writing here attached is a true copy from a judgment docket formerly belonging to Chase Bros.; that the minutes and extract contained in said judgment docket were made from the records and files in the office of the clerk of the superior court of Cook county, Illinois, prior to the destruction of the records of Cook county, Illinois, which occurred on or about October 8th and 9th, 1871; that said judgment docket containing said minutes and extracts was at the said date of the destruction of said records in the possession of persons who were then engaged in the business of making abstracts of title for others for hire.

That affiant is a member of the firm of Handy and Company, who are engaged in making abstracts of title to lands in said county for others for hire, and that the said judgment docket containing the minutes and extracts from which the said copy is made is now in the possession of affiant, as manager of abstract department of the Title Guarantee and Trust Company.

HENRY H. HANDY.

Subscribed and sworn to before me this twelfth day of January, A. D. 1894.

[SEAL.] EDWARD OLSOTT CHASE,
Notary Public, Cook Co., Ill.

69 Cross-examination by Mr. HALL:

Q. Have you seen any other book or record similar to this covering or purporting to cover the entries in this case?

A. I have not.

Q. From what source did you get the title to the case as it appears on this book of record?

A. From the papers filed in court.

Q. From what paper?

A. Whatever they were. I have no distinct recollection of what they were. The precipæ, I presume.

Q. Do you remember?

A. Oh, no.

Q. From what source do you get the entry "Trespass on the case"?

A. From the same papers.

Q. Do you know from what papers?

A. I don't remember.

Q. Are those entries made at one and the same time or at different times?

A. They were made on the day according to the dates they appear to be there.

Q. They are made on the dates that are written here?

A. Yes, sir.

Q. Under the different headings?

A. Yes, sir; they are written on there, filed such a day. Jul- 16th it was filed.

Q. From what source do you get the entry "Verdict, $833.35"?

A. First from the minute book of the clerk of the court.

Mr. ROBINSON: Anything further? You said, "First from."

Mr. HALL: That is all I asked him. That is responsive. From what source did you get the entry, "Motion for a new trial"?

A. The same book.

Q. From what source did you get the entry "Motion denied, and judgment and appeal"?

70 A. From the minute book, the clerk's minute book.

Q. Are you liable to make error in making these entries?

A. I am liable to err, like any other person.

Q. If a record should be offered in this case, made by a gentleman who was employed in the same business as yourself at that time, showing that this case was in assumpsit, would that weaken your faith in that entry?

A. Not at all.

Q. Might you not be wrong?

A. I do not think I am wrong.

Q. Did you ever see any other record in this case which reported it as being in assumpsit?

A. I have seen no other books of this nature.

Q. Of this nature?

A. No.

Q. Did you testify in this case on the former trial?

A. I think I did, before Judge Payne.

Q. Do you remember a similar record in another record book similar to this being offered?

Mr. ROBINSON: I don't think that is a proper question to put to the witness.

The COURT: I do not see as that is cross-examination in any way. I sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: That is all, if the court please.

Redirect examination by Mr. ROBINSON:

Q. You were asked from what source you obtained several entries. From what source did you obtain the entry of judgment?

71 A. I obtained that from the clerk's minute book. That is my first knowledge I had of it. Afterwards compared with the record in which the orders were written of the court and the number of book and page as given here.

Q. So you examined the original record of judgment?

A. Yes, sir.

Q. And compared with it the entry?

A. Yes, sir.

Q. In which is noted the book and page of that entry?

A. Yes, sir; compared it.

Q. You were asked with regard to the degree of your certainty as to the form of action, it being an action of trespass on the case. From what do you speak with that positiveness?

A. No.

Q. Did you ever happen to discover any error in the entries you made in this way?

A. No, sir.

Q. If there should be produced by some other person a memorandum stating that this action was in assumpsit, would you believe that entry was correct or that your own was correct?

Mr. MERRIFIELD: He had already answered that.

Mr. ROBINSON: You may state.

The COURT: I didn't hear what you said.

Mr. HALL: Let him answer that question again.

The COURT: No. I didn't hear what Mr. Merrifield said.

Mr. MERRIFIELD: I said that he had already answered that in response to a question we put.

Mr. ROBINSON: I asked him to simply state some reason for it. He answered, if he could see it he would not believe it was true; that he would believe his own entry. I do not know as I care very much for it. He has, perhaps, said all that he need to.

72 Q. Do you think there is any likelihood you did make a mistake in regard to that element in the case?

A. No, sir.

Mr. HALL: I would like to ask one more question, if the court please.

The WITNESS: If you will allow me——

Mr. ROBINSON: Yes. State anything you want to.

The WITNESS: If that had been written "Trespass upon the case upon promises," I should have written it assumpsit.

Mr. HALL: I object to that and move to strike it out, if the court please.

The COURT: Yes. I think that should go out.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

Recross-examination by Mr. HALL:

Q. Do you know whether or not Handy & Co. have in their possession and use a book of records similar to this?

(Question withdrawn.)

Q. Did you ever see the judgment docket covering the period at which this judgment was entered, owned and kept by Shortall & Hoard?

Mr. ROBINSON: That is objected to. The gentleman is assuming that they keep a judgment docket. I do not believe the question is fair. I do not believe they kept any such a book. You mean an abstract of judgment record?

Mr. HALL: An abstract of judgment records.

73 Mr. ROBINSON: Well, that might be better. I do not think that that question is quite fair. If there was any other book that they are going to ask him about, I think they should produce it and examine him with reference to the book, and not ask him about something that is not before the court, and we don't know what he is talking about.

The COURT: I take it that that is a matter of defense; that would not come in under cross-examination. I do not think it is cross-examination.

Mr. HALL: Perhaps that's so. That is all, Mr. Stevens.

JAMES FRAKE, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. ROBINSON:

Q. I am not sure whether I asked you when you were on the stand whether the office docket that you testified about and referred to showed the number of the original case in the superior court that this suit was based on, for I forgot it; does your docket show the number?

A. It does.

Q. What is the number shown, the general number?

Mr. HALL: Of course, we make the same objection to his test-fying from the docket as was made to the other testimony
74 in regard to the entries in his docket.

The COURT: Of course, now that necessarily is a matter about which he cannot testify from refreshing his recollection. If it is competent, it is competent to offer it as entry from this book, and that would speak for itself, I take it. I assume that a man would not have his recollection revived by that, so that he could tell independent of it what the number was. Now, as I recollect the testimony of Mr. Frake, it was that he made these entries in this docket—his office docket—at the time of the transactions, and that they were true and correct; that is my recollection of his testimony. Now, then, that being so, I take it, it is competent to offer in evidence the docket entry for the purpose of showing this number.

Mr. ROBINSON: Very well; we offer that docket in evidence for the purpose of showing it.

The COURT: Very well.

Mr. HALL: I would like to see that book.

The COURT: Now, as refers to that, when was that number put in there?

A. The next day after I saw it in the files or when I looked for the different records; I can't tell.

Q. Did you put it there?

Mr. ROBINSON: I suppose it may be agreed in this record that the book shows the number——

The WITNESS: There is two numbers; one is term number and the other is general number.

75 Mr. ROBINSON: I offer that book as showing the general number of the suit to be 31053.

Mr. HALL: Do you offer all of the entries upon that page of that docket?

Mr. ROBINSON: I think I have all the other testimony.

Mr. HALL: I don't think counsel should be allowed to offer part of it unless he offers all of it and allows us to make our objection to it. There are entries upon this page which have not been testified to by the witness. If Mr. Robinson wants to offer a part of this page and the court allows it to go in, it should all go in.

The COURT: If there is anything upon that page that shows or tends to show that that number is not correct, it should go in evidence; in other words, if there is anything in that docket that tends to impeach the correctness of that number, it may go in.

Mr. ROBINSON: I will ask you to state whether that case was tried by jury.

A. It was.

Q. I will ask you to state whether the evidence was offered and introduced on the part of the plaintiff.

A. It was.

Q. Under the issues in the case?

A. It was.

Cross-examination waived.

Whereupon the plaintiff rested his case.

Mr. HALL: We desire to make a short motion.

The COURT: Well?

Mr. HALL: I think a finding here should be made in favor
76 of the defendant, on the ground that there is no competent proof here of the judgment sued on, and on the further ground that even if there is any proof tending to show a judgment, that the entry of the record of that judgment has not been shown, and that therefore a mere part of the record of judgment would not be competent to establish a judgment.

The COURT: Well, now, do you desire the court to infer from what you now state that there is another record in the hands of Handy & Company that the plaintiff has not produced. There is something further about this case than what Mr. Stevens has presented here; that, in other words, there is anything that the plaintiff has suppressed in the way of a record?

Mr. HALL: Oh, no, if the court please, I do not. The other record we will show by the way of defense, and your honor knows what it will be.

The COURT: Well, anything further?

Mr. HALL: Another point is that the record that they have sought to establish, they have sought to establish by parole evidence, and we contend it is incompetent for them to establish that record in that way; that the statute has provided a method for the restoration of records which the plaintiff has not pursued.

Mr. ROBINSON: That form particularly has been passed upon by the appellate court in this case.

The COURT: What is the volume?

Mr. ROBINSON: Vol. 55; Forsythe *vs.* Vehmeyer; page 224.

Mr. HALL: There is a case in the 65th Appellate, a recent
77 decision in which the appellate court has held, I think, that a record of this kind must be restored under the provisions of the statute; that a lost record must be restored under the provisions of the statute. That statute provided that an affidavit shall be presented to the court where the record is lost, and that service shall be had upon the parties in interest, and that they shall have opportunity to appear before the court and show what the record really was. Now, in this case there is this difficulty: We deny that the record was what they claim it was. We are compelled to try the two issues in this case as to what the record was, and then as to whether or not this defendant is liable. We contend strongly that the statute having made the provision for the restoration of records in a proceeding separate and apart from this suit, they must follow that case, as the statute has directed them to do so, and must give us an opportunity to make our showing as to what the record was.

The COURT: Any other point?

Mr. HALL: Then, when they have restored the record, they are in position to bring suit on the judgment, if there is any.

The COURT: Any other point?

Mr. HALL: I think that is all.

The COURT: Well, save your record.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

78–80 And thereupon the defendant, to maintain the issues on his behalf, introduced the following evidence, to wit:

JACOB FORSYTHE, the defendant herein, being called and sworn on his own behalf, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?

A. Jacob Forsythe.

Q. You are the defendant in this case?

A. Yes, sir.

Q. Do you remember the trial of this case in the year 1871?

A. Yes, sir.

Q. Were you present at that trial?

A. I was present on the trial, but I had to go away to my train, as I lived in the country; I had to make my train, and I left before it was completed.

Q. Do you remember for what you were sued in that case?

Mr. ROBINSON: I object. This case is tryable by the record, your honor.

* * * * * * *

81 (Last question read by the reporter.)

The COURT: Just answer by yes or not; let him answer.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

82–86 A. I was sued for.

The COURT: Answer the question, yes or no. Do you know for what you were sued in that case?

A. Yes, sir.

Q. Go on.

Mr. HALL: Upon what do you base your recollection as to what you were sued for at that time?

A. I have that account with Vehmeyer, which shows precisely what it was for.

Q. From a reference to that account could you, then, of your own independent recollection, state what Mr. Vehmeyer claimed upon that trial of the case?

Mr. ROBINSON: Wait a moment. I object to that. It will be no evidence in regard to what the records and proceedings in this case already was, filed in this case, for him to refer to the account between him and Mr. Vehmeyer; in other words, the witness is simply aiming to get back to testifying to his view of the original controversy.

The COURT: I sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

* * * * * * *

87 Mr. HALL: Mr. Forsythe, you may state, if you recollect, what the testimony of Vehmeyer was as to his cause of action against you in that case.

Mr. ROBINSON: That is objected to.

The COURT: The objection is sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. HALL: You may state whether or not at the time of the trial of this case or at the time the original suit was brought
88 against you by Vehmeyer, whether or not you had in your possession 200 cords of wood or more.

Mr. ROBINSON: That is objected to.

The COURT: The objection is sustained.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

The COURT: I do not know but that we would shorten this considerably by your making an offer, would not it?

Mr. HALL: Perhaps so.

Mr. ROBINSON: I believe the best way would be to go on and ask questions.

Mr. HALL: I will have to make an offer again when I get through asking questions.

Q. Have you a statement in your possession made by Vehmeyer of his account against you as it stood prior to the trial of the case in 1871?

Mr. ROBINSON: That is objected to as immaterial.
The COURT: We had that question before, I think.
Mr. ROBINSON: Certainly.
The COURT: It is the same question that the witness referred to?
Mr. HALL: Yes.
The COURT: The same ruling.
Mr. HALL: He can answer whether or not he has that in his possession.
The COURT: He can answer yes or no.
Mr. HALL: You may answer that.

A. I have.
Q. Look at the document which I now hand you, dated Chicago, May 1st, 1869, purporting to be a statement of account, made
89 and signed by Henry Vehmeyer and addressed to J. Forsyth, and state whose signature is attached to that document.

Mr. ROBINSON: That is objected to as immaterial.
The COURT: Have you seen that account?
Mr. ROBINSON: No. I do not really care to. I do not care to go into the trial of this original suit any more. It is *res judicata.*
The COURT: I sustain the objection.
To which ruling of the court defendant, by his counsel, then and there duly excepted.
Mr. HALL: I asked him to identify the signature, so that I may offer it.
Mr. ROBINSON: That is objected to as immaterial.
The COURT: Let him do that. That is all right.
To which ruling of the court plaintiff, by his counsel, then and there duly excepted.
Mr. HALL: Where did you see that account?
Mr. ROBINSON: That is objected to as immaterial.
The COURT: He has got a right to save his record on it when he makes his record. How is he going to make his record on it—to save his point on it—unless he makes the preliminary proof?
Mr. ROBINSON: To save the objection, perhaps formally, I object to anything that is immaterial, irrelevant, and incompetent to this case.
The COURT: I think he should answer this question.
To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

90 A. That was received by me at the post-office at Cassella, Indiana.
Mr. HALL: From whom did you receive it?

Mr. ROBINSON: That is objected to.

The COURT: How, in what way, did you receive it?
A. Through the post-office.
Mr. HALL (to the witness): Is the signature attached to it the signature of Henry Vehmeyer?

Mr. ROBINSON: That is immaterial.

The COURT: Objection overruled.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. It is.

Mr. HALL: Can you state about when you received it?

Mr. ROBINSON: That is objected to as immaterial.

Objection overruled; to which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. No. I could not recollect the date that I received that. It is dated May 1st, 1869.

Mr. HALL: Did you receive it within a reasonable time thereafter?

A. Yes, sir.

Q. Did you have it in your possession prior to the bringing of the original suit against you?

A. I did.

Q. Had you any other statement of account from Mr. Vehmeyer prior to his bringing the original suit against you?

Mr. ROBINSON: That is objected to as immaterial.

The COURT: Well, I think I will let him answer the question.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. I had a letter from him which contained statement of account.

91 Mr. HALL: Is this the last statement of account you received from Mr. Vehmeyer prior to his bringing the original suit against you?

Mr. ROBINSON: That is objected to as immaterial.

Objection overruled; to which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. Yes, sir; that is the last one.

Mr. HALL: Well, we will offer this in evidence.

(Paper here marked by the reporter Defendant's Exhibit 1 for identification.)

Mr. ROBINSON: We object to it as incompetent.

Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Here insert Exhibit 1.

92 CHICAGO, *April 3d*, 1869.

Mr. Jacob Forsythe, Esq.

DEAR SIR: When I last saw you, you wanted me to write you about the land. I have not had a chance to sell it or to get a bid for it; do not think I can sell it for your price, $20. I would not want to take it for more than $500 on account for fear of nor getting my money out of it; would rather have $500, then the land; that is all I have to say about it. If you think it worth more, you will, of course, keep it.

Now, sir, if you intend to do right by me, you will pay me at once. I know you can do so if you want to. I have lost 16 (sixteen) months on your account, and I mean to do something by the first of May. You can pay me by the 15th of April; that will give me two weeks to look up something. If you had rather give me the land than the money, make out the deed at once and send it to me, with the abstract, in order to give me time to turn it into money by the first of May. I hope you can get more money for it than I can, for I'd rather have the money. Now, sir, do not undertake to put me off any longer; you know as well as I do how you treated me last year. I have not deserved such treatment from you as I have received lately, and you know it. I should never have sold any wood for you this winter (for I could have done better) if I had not expected to have received money enough from you to have
93 nearly, if not quite, paid me off. Instead, you have not given me half enough to pay for my time and labor. Everything I have done for you, sir, I have done as I would have for a brother or any one, and for you to go and send wood (which was sold to Giles) to parties here who were not expecting it, I really did not know what to make of that, unless it was that you were afraid to trust it to me for fear you would not get your money.

I tell you, sir, if you had sent ten cars instead of a few you would have got your money as well as you did for what you did send. I will here say to you, sir, the day you sent wood to Messrs. Norton & Johnson, that same day I knew all about it. Mr. Norton told me he had ordered two cars two weeks before he got the wood and had not expected to get any at all. I knew all this and more three days before I paid H. Roe $75.00. Most any one but me would have kept the money on account and not paid Harvey one cent on his order from you, but that is not my way of doing when any one is owing me. I want them to pay me if they are able; if not, I don't bother my head about them.

Defendant's Exhibit 1.

Now, then, sir, if you had told me you would not send Giles any more wood, but would give it to some one else, it would have made no difference to me, only this: when I sell a man a thing I always do as I agree to do, and never back out. Mr. Giles may think bad of me and think it my fault, the way he has been dealt with, but I could not help it. You may think by this that I am very much down on you, but that, sir, is not the case; but I do expect to see you come up like a man and do what is right. One question, and then I will stop: Is Mrs. C. M. Forsythe aware how much she and you owe me? A friend of yours told me yesterday that bills Mrs. Forsyth is owing she is prompt in having paid. That made me think she did not know as much as she ought to of my case. Hoping you will answer soon, I remain,

Yours truly,

(Signed) HENRY VEHMEYER.

Defendant's Exhibit 1.

94 Mr HALL: Look at the documents which I now hand you, dated Chicago, April 3rd, 1869, addressed to Mr. Jacob Forsythe and purporting to be signed by Henry Vehmeyer, and state whose signature is attached to it.

A. Henry Vehmeyer's.

Q. How did you come into possession of that letter, Mr. Forsythe?

A. Through the post-office.

Q. About when?

A. About the time it was dated, giving a reasonable time for delivery.

(Paper here marked Defendant's Exhibit 2 for identification.)

Mr. HALL: We will offer that in evidence.

Mr. ROBINSON: That is objected to.

The COURT: The objection is sustained.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Here insert Exhibit 2.

95 DEFENDANT'S EXHIBIT 2.

CHICAGO, *May 1st*, 1869.

Amount of grocer*ie* bills from April 15, 1866, to April 1, 1867	$338.61
$338.61 intrs., 2 years, 1 month, @ 6 p'r c. 6 12) 2031.66 — 1.69 2 4063.32 169	
$42.32	42.32
$51.46 from June 29th, '67, to August 21st, '67 6 12) 308.76 — 1 year, 8 months. 205 25.7	51.46
5.13	5.13
Total	$437.52

Amount to May 1st, 1869:

200 cords of wood @ 5.00, Dec. 5, '67.....	
Total cash for wood.....	923.40
Commission or profit on the wood to have been by Feb'y 1st, 1869.....	200.00
	$1,123.40
By cr.....	270.00
Bal*ls*...	853.40
15 months' interest @ 10 p. c.....	106.67
	$960.07
Grocer's amount.....	437.52
	1,397.59
Nov. 1, '68, by Iowa land.....	600.00
Bal*s*	797.59
By interest on the Iowa land for 6 months @ 10 p. c., from Nov. 1, '68, to May 1st, '69	30.00
	767.59
96 Dec. 30, 1869, by one car of wood on which was paid the freight, 7 cords, $6.00.	32.00
	$735.59

CR.

45 cords of wood @ 5.....	$225.00
Profit on	45.00
	270.00

97 Exhibit 2.

CHICAGO, *May 4th*, '69.

J. Forsyth, Esq.

SIR: Received yours of May 1, '69, this morning; have not seen Mr. Parks, but I have sent him word that you had written him. I have made your bill as small as I could. I think if I had made it smaller I would not be doing justice to myself. You certainly cannot find fault with it.

Yours truly, HENRY VEHMEYER.

(Over.)

In regard to the tax title which Mr. Gage has, I think there can be no mistake, as he has a deed from the sheriff and it is recorded; he paid 80 cents for 1863 taxes; he paid them in July, 1864. If you can send me the tax receipt, I can redeem what money I paid him for quitclaim deed.

H. V.

P. S.—Let me know what to do with the gas fixtures; I want to get rid of them as soon as possible. Send for the maps if you want them. There is a small package here which Mr. Hawkey left here for Mrs. Forsyth.

H. V.

Defendant's Exhibit 2.

Mr. HALL: Mr. Forsyth, the declaration in this case charges that the plaintiff advanced to you certain sums of money upon your promise to ship to him 200 cords of wood which it is stated you had in your possession at the time the money was paid by the
98 plaintiff to you. You may state whether or not, at the time the money is alleged to have been paid to you by Mr. Vehmeyer on account of this wood, you had 200 or more cords of wood in your possession.

Mr. ROBINSON: That is objected to.

Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: You may state whether or not Mr. Vehmeyer in his account against you, upon which suit was brought and judgment, as he claims, was recovered in the original suit, he charged you with the profit which he would have made upon the 200 cord- of wood in question.

Objected to by counsel for plaintiff. Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: I now offer to prove by this witness, your honor, that at the time of the alleged sale by him to Vehmeyer of the 200 cords of wood in question he, Forsythe, had more than 200 cords of wood in his possession, which he was ready and willing and able to deliver to Mr. Vehmeyer as the latter demanded, and that Mr. Vehmeyer, after a portion of this wood had been delivered, countermanded the order and requested *that* Mr. Forsyth not to ship any more wood, because it was difficult to get cars, etc., for the shipping of it. We offer to prove by this witness, further, that at the time this suit was originally brought by Vehmeyer against this defendant that Vehmeyer testified that he had an open account with Mr. Forsyth for groceries; that he had advanced him certain amounts of money on account of wood, and that he had credited Mr.
99 Forsyth with certain amounts of money paid by him on account; that he had charged Mr. Forsyth with a commission or profit on 200 cords of wood claims to have been sold to him, the sum of $200, being $1 per cord, and that after having made that charge against Mr. Forsyth he received from Mr. Forsythe and credited him with the sum of $600 on account; that this account was the only cause of action which Vehmeyer had or claimed to have against Forsythe at the time of the trial, and that Mr. Forsythe at the time of that trial testified that he, Vehmeyer, had ordered Forsythe not to ship any more wood after he, Forsythe, had shipped about 45 cords of wood.

Mr. ROBINSON: To which offer I object.

The COURT: Well, that's the same thing that we have had. I sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Mr. Forsythe, were you ever the petitioner in any bankruptcy proceeding under the national bankrupt law of America?

A. Yes, sir.

Q. When did those proceedings commence?

Mr. ROBINSON: You have a record of the bankruptcy. I think that is a thing you ought to produce.

Mr. HALL: I want to lay a foundation for it--this certified copy.

The COURT: Very well.

Mr. HALL: About when did those proceedings commence; can you remember?

Mr. ROBINSON: I object to that as not being properly proven. You cannot prove a record in that sort of a way.

100 Mr. HALL: This witness can state when he commenced bankruptcy proceedings.

Mr. ROBINSON: No; the record is the best evidence.

The COURT: Have you got the certified copy?

Mr. HALL: Yes.

The COURT: Ask him where his original discharge is.

Mr. HALL: Did you have an original discharge under the bankruptcy act?

A. I did.

Q. Where is it now?

A. I don't know.

Q. Have you made a search for it?

A. I have.

Q. Where have you searched?

A. Oh, I have searched through my house and also through the office.

Q. You have made search in every place it would — liable to be?

A. Yes, sir; liable to be; yes, sir.

Mr. HALL: We offer the certified copy.

Mr. ROBINSON: I will object to it formally. I do not know as I have any special objection to it as not being properly certified.

The COURT: When did you see your discharge last?

A. I saw it last when I gave it to Mr. Green—A. W. Green.

Q. When was that?

A. That was shortly after the commencement of this proceeding.

Mr. HALL: You never got it back from him?

A. I never did.

The COURT: Of course, the foundation is not laid for the introduction of this, if it is objected to.

Mr. ROBINSON: I object to it.

101 Mr. HALL: Did you ever make any inquiry of Mr. Green in regard to its whereabouts?

A. I did, and he said that he had had——

Mr. ROBINSON: I object to what Green told you; that's hearsay.

The COURT: Yes. That would not be competent.

Mr. HALL: Did you ask Mr. Green for it?

A. I did.

Q. Did you get it from Mr. Green?

A. No; not in my hand, but——

Mr. ROBINSON: Let him answer the question.

The WITNESS (continuing): Oh, what is that gentleman's name? I forget his name. It was Green.

Mr. MERRIFIELD: Robbins?

A. Robbins. Yes.

The COURT: Did Robbins have it?

A. He had it.

Mr. HALL: Robbins was your attorney in this case at one time, was he not?

A. Yes, sir.

Q. Was Mr. Robbins able to produce it?

Mr. ROBINSON: I do not think he testified about that.

Mr. HALL: Did you ask Robbins about it?

A. No; because the trial——

Mr. ROBINSON: Wait. Never mind the reason.

The WITNESS: The trial was on, or would be very shortly, and after that I went to California, then, and left it in the hands of my attorneys.

Mr. MERRIFIELD: I was going to ask what, if any, effort you made to get the discharge back from Robbins—what was the result of your efforts?

102 Mr. ROBINSON: Don't ask two questions at once.

Mr. MERRIFIELD: What effort did you make to get it from Robbins?

A. I did not ask him for it personally. My son asked him for it.

The COURT: Were you present at the time?

A. No. I was not.

The COURT: That would not be competent. The existence of a fact which seems to be in this case, Mr. Forsyth was discharged in bankruptcy. We ought not to have much delay from it, it seems to me.

Mr. ROBINSON: I would not particularly object to your honor admitting it over my objection.

The COURT: Well, let it go in.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

Paper here marked by the reporter Defendant's Exhibit 3, and was and is in words and figures following, to wit:

Here insert Exhibit 3.

103 In the District Court of the United States, District of Indiana.

In the Matter of JACOB FORSYTH, Bankrupt. No. 3292.

At Indianapolis, in said district, before the Honorable Walter Q. Gresham, judge of said court, sitting as a court of bankruptcy, the proceeding following was had on the 30th day of December, A. D. 1880:

Whereas Jacob Forsyth has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all requirements of law in that behalf, it is therefore ordered by the court that said Jacob Forsyth be forever discharged from all debts and claims which by said act are made provable against his estate and which existed on the 30th day of August, 1878, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Defendant's Exhibit 3.

104 DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the district court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of an order made and entered in said court on the 30th day of December, 1880, in the matter of Jacob Forsyth, bankrupt, in bankruptcy, as fully as the same appears of record in my office.

Witness my hand and the seal of said court this 3rd day of February, 1897.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, John H. Baker, judge of the district court of the United States for said district, do certify that at the date of the foregoing certificate Noble C. Butler was and now is the clerk of the district court of the United States for said district, and that his attestations aforesaid is in due form of law.

Witness my hand this 3rd day of February, 1897.

JOHN H. BAKER, *Judge.*

Defendant's Exhibit 3.

105 Mr. HALL: After the entry of this alleged judgment by Vehmeyer against you, what, if anything, happened to you personally?

Mr. ROBINSON: That is a pretty broad question.

The COURT: I suppose in connection with this suit. Let him answer.

To which ruling of the court plaintiff, by his counsel, then and there duly excepted.

A. I was arrested by a deputy sheriff on La Salle street.

Mr. HALL: What did the deputy sheriff do with you?

A. Took me to jail.

Q. In what case was that?

A. That was this case of Vehmeyer's.

Q. The case was tried in 1871?

A. Yes, sir.

Q. What proceedings, if any, did you take after your arrest?

Mr. ROBINSON: That is objected to (citing vol. 55, page 225, Ills. Reports). Mr. Frake resisted his right to be discharged, and while that question was pending he was admitted to bail under recognizance and allowed to go home. The date was very shortly before the big fire and before his appearance before that court. The case was permanently destroyed and never has been revived. That happened the night before, we say, that *ca. sa.* writ was issued upon which Mr. Forsyth was arrested. There is no issue under which he can introduce any evidence in defending this case by reason of anything that transpired in the county court. Mr. Forsythe has had a multitude of attorneys in this case—first, Robbins & Green, and then Tourtelette, and then this gentleman has succeeded
106 since. These attorneys have prepared their evidence with a great deal of care and all the skill they could command. They prepared the plea which is in the files of this case. I called that up before Judge Ewing, who considered it very carefully and sustained the demurrer to the plea, so that they stand today in precisely the same position they did before. They have got no pleas here. The question is saved upon the demurrer to the plea, if there be any question.

The COURT: Was this case before Judge Ewing?

Mr. HALL: Yes.

The COURT: How does it come to be on my call, then?

Mr. ROBINSON: It is on your docket. He sustained a demurrer to that plea, in which they sought to bring in this county-court matter, and they have no plea under which this evidence can be introduced.

Mr. MERRIFIELD: I think the demurrer to that plea was sustained, and that this evidence is admissible. We propose to show that the county court discharged this defendant.

The COURT: Does the defendant want this evidence?

Mr. HALL: Yes; I should think we should get this in. We contend that discharge in the county court is *res judicata* as to any element of fraud in the case.

Mr. ROBINSON: Well, that has been decided time and again.

The COURT: That proceeding in the county court which developed there with the rest was based on fraud.

Mr. HALL: No; we contend that Judge Wallace, after the hearing

of the case, ordered that he should schedule and allowed him to schedule, and he did schedule.

107 The COURT: Is it claimed anywhere that the arrest was on account of a judgment based on fraud?

Mr. HALL: As a matter of fact, we claim the arrest was made because Mr. Forsythe was a non-resident. He could have been arrested on any judgment had in any action on the case, but a judgment in an action on the case is not necessarily for fraud in fact.

The COURT: It did appear to be an action on the case.

Mr. HALL: No; but, assume that it was an action on the case, we claim that Judge Wallace, having decided that this defendant was entitled to schedule, must have decided that there was no fraud in the case.

The COURT: Do you admit it was an action on the case?

Mr. HALL: No; we don't admit that.

The COURT: If you go into that realm of irrelevant evidence, if it is irrelevant, it might let in evidence on the other side that you would not want, perhaps. I do not know whether you *you* would want to go into that or not, but you can do as you please.

(Last question read by reporter.)

Mr. MERRIFIELD: We purpose to show facts which would indicate what the record was.

Mr. HALL: It is an attempt on our part to restore the record.

108 The COURT: If you go into that and you claim that the proceedings in the county court released the defendant here from the claim that is made against him here——

Mr. MERRIFIELD: Not from the claim; from the debt; but that it was of such a nature as not to be exempt from the discharge.

The COURT: Would not it be competent for them to show by oral testimony what the nature of that claim was there, and would not then we have to open up the evidence in this case and try the merits of it? Would not we get there? Would not we get there? And if we got there, why the evidence of the defendant would be on his side that this was not an action on the case based on fraud and deceit, as shown by the record. *Q.* You can do as you have a mind to. I do not think you have any pleadings here that would justify it.

Mr. HALL: You would not object, I suppose, to my making an offer?

The COURT: Make any offer you please.

Mr. HALL: I will show by another record——

Mr. ROBINSON: I will grant you the records of the county court were destroyed. I won't put you to any trouble on that score.

Mr. HALL: If they were, I shall offer secondary evidence of the record.

Mr. ROBINSON: You must offer secondary evidence of record.

Mr. HALL: I intend to do that.

Mr. ROBINSON: I am going to insist upon the trial of this case that there is no plea here under which such evidence can be introduced.

109 The COURT: I do not think there is; make your offer.

Mr. HALL: I offer to prove by Jacob Forsythe that he was arrested under this proceeding; that he filed his petition in the county court before Judge Wallace, asking for leave to schedule in the case; that Judge Wallace granted him leave to schedule; that Mr. Forsythe's attorney, in the presence of counsel for Vehmeyer, at that time stated it would take some time to prepare a schedule; that Judge Wallace said, "Prepare your schedule and file it as soon as possible, and in the mean time you can give a bond that will protect this court on the condition that you shall file your schedule within reasonable time;" that Mr. Forsythe thereupon filed the schedule, with Mr. William Hansprough on his bond as a surety, the condition of which bond was that Mr. Forsythe should within a reasonable time file his schedule. Then Mr. Forsythe did prepare and file a certain schedule in the county court, and that he was discharged, and that nothing more was ever done with the account.

Mr. ROBINSON: That is objected to.

Mr. HALL: And that this proceeding was had in the county court more than 20 days prior to the Chicago fire on October 9th, 1871.

The COURT: Yes; the objection is sustained.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

Mr. HALL: On the former trial of this case Robert Clark Forsythe, the son of Mr. Forsythe, testified. The case was called before
110 your honor on the first call in January. Shortly thereafter I notified Mr. Robinson that we would have to take the deposition of Robert Clark Forsythe. It was difficult to get him, as he was out looking after mining property in Washington Territory, a great many miles away from railway stations, and we stipulated that his testimony given on the former trial should be taken in this case, and stipulation has been signed by the attorneys in this case.

Mr. ROBINSON: It is all objected to as immaterial in this case.

The COURT: Is it necessary to read that?

Mr. ROBINSON: What transpired in the court-room—what transpired before Judge Porter?

(Mr. Hall here reads deposition.)

(Here insert deposition.)

DEFENDANT'S EXHIBIT 4.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

HENRY F. T. VEHMEYER } Gen. No. 131,807.
vs.
JACOB FORSYTH. }

It is hereby stipulated and agreed by and between the parties hereto and their respective attorneys that upon the former
111 trial of said cause in the superior court of Cook county, Illi-

nois, in this court as case No. 131,807, the testimony of Robert C. Forsyth was given in behalf of said defendant; that said Robert C. Forsythe was upon the trial of said cause, as aforesaid, duly sworn and examined as a witness in said cause.

And whereas said Robert C. Forsyth has been absent from the city of Chicago for more than a year, and is now in British Columbia, in a region where it is impossible to take his deposition in this case, it is hereby further stipulated and agreed that the testimony of said Robert C. Forsyth, given by him at the trial of said cause before Judge John Barton Payne, may be read an- introduced in evidence in behalf of said defendant before his honor Jonas Hutchinson, one of the judges of said court, at the trial of said cause when reached on the present calendar, and that the same may be admitted upon the trial of said cause as the sworn testimony of said witness the same as though he were present in person and examined and allowed to testify upon said trial, but said plaintiff reserves the right to object to the competency of such testimony or any portion of it.

It is further stipulated and agreed that said testimony of said Robert C. Forsyth at said trial before said Judge Payne was and is as follows, to wit:

ROBERT C. FORSYTH, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

112 Direct examination by Mr. ROBBINS:

Q. What is your name?
A. Robert C. Forsyth.
Q. Are you the son of Jacob Forsyth, the defendant in this case?
A. Yes, sir.
Q. When was your hearing impaired—what year?
A. 1875.
Q. Do you remember anything about a suit brought before the fire by Mr. Vehmeyer here against your father?
A. Yes, sir.
Q. Were you present at the trial of that case?
A. I was; I was a witness.
Q. You were a witness?
A. Yes, sir.
Q. Was Mr. Forsyth a witness on that trial?
A. Yes, sir.
Q. Did you hear Mr. Forsyth testify?
A. No. I was too far away; I was back in court.
Q. Did you hear any of his testimony?
A. No, sir.
Q. Did you hear anything said by any of the witnesses on that trial about whether the wood was on hand or whether Mr. Vehmeyer had agreed to take it?

Objected to by plaintiff as leading.
The COURT: He can say yes or no to that.

A. Why, Vehmeyer——

Mr. ROBINSON: The question is whether you heard anything. Say yes or no.

A. On the stand?
Q. Yes, sir.
A. No, sir.
Q. You heard nothing on the stand?
A. Yes, sir.
Q. You mean you heard nothing while you were on the stand?
A. I didn't hear anybody testify on the stand. They were there, but I did not hear them.

113 Q. Now what did you hear about the trial?

The COURT: If he did not hear any evidence how would it be competent?

Mr. ROBBINS: Perhaps he might have heard the directions of the judge as to the character of the judgment.

The WITNESS: Yes, sir; I heard that.

Q. What did you hear?
A. I heard when the jury came in from the jury-room and returned their verdict; I heard the judge and the lawyer for the plaintiff argue about the character of the judgment.

Mr. ROBINSON: I move to strike that out.

The WITNESS: The plaintiff wanted the judgment for fraud as well as for the amount of the indebtedness, and the judge would not allow that, as there had not been any fraud proven.

Mr. ROBBINS: That was what the judge said?

A. That was what the judge said, as Vehmeyer had declined to take any more wood; he was getting wood at the time and he declined to take any more——

Objected to by plaintiff.

Q. Are you stating what the judge said?
A. Yes, sir; that is what the judge said.
Q. What reason did the judge give for not allowing a judgment for fraud?

Objected to by plaintiff.

The COURT: Well, what did the judge say?
A. He said there had been no fraud proven.
Q. Did he say anything else about why there had been no fraud proven?
A. Yes, sir.
Q. What did he say about that?
A. He said Vehmeyer had been getting the wood and had refused to take any more.

114 Q. Do you know of your father having been arrested on this judgment?
A. Yes, sir.
Q. Do you know of any proceedings in the county court?
A. Yes, sir; he scheduled.

Q. He scheduled?
—. Yes, sir.
Q. State all you know about the proceedings in the county court.
A. Well, he was up in court and scheduled and the attorney for Vehmeyer objected.
Q. Objected to what?
A. Objected to his scheduling, and I did not hear just exactly what the argument was, but the judge overruled it.
Q. Overruled the plaintiff's attorney?
A. Overruled the plaintiff's attorney and allowed him to schedule.
Q. Do you remember what judge that was?
A. No; I don't.
Q. Do you remember whether any schedules were filed or not?
A. Yes, sir; there was a schedule made.
Q. There was a schedule made by whom?
A. By my father.
Q. What happened after the schedule was made, or after the judge made this decision?

Objected to by plaintiff. Objection overruled.

Q. After this decision of the county court that your father should schedule, did your father go free from the arrest?
A. Yes, sir.
Q. Did you testify in that case you say?
A. Yes, sir.
Q. What did you testify to?

Objected to by plaintiff.
The COURT: If he remembers he may state.
Mr. ROBINSON: Does your question mean what did he say in his testimony?
Mr. ROBBINS: Yes, sir.

Q. What did you testify to on the stand?
115 A. To the amount of the wood being on hand and the fact that Vehmeyer had declined to take any more; that he told me that he didn't need any more.
Q. You testified that Vehmeyer had told you that he did not want any more wood?
A. Yes, sir.
Q. That was before Judge Porter?
A. Before Judge Porter.

Cross-examination by Mr. ROBINSON:

Q. How old are you now?
A. 43.
Q. What was your age in 1871?
A. 20 years old.
Q. What were you doing—what was your business then?
A. I wasn't doing much of anything. I was living in Huntington, on a farm.

Q. Did you do anything at all?
A. No, sir.
Q. Didn't occupy yourself with anything?
A. No, sir; nothing special.
Q. Are you quite sure that you were present at this trial of this case of Vehmeyer against Forsyth?
A. O, yes, sir.
Q. Where did it take place?
A. It took place here at the old court-house.
Q. Do you recollect what room?
A. In the superior court.
Q. What room in the superior court? How did you happen to be present?
A. I was a witness.
Q. Who requested you to be present as a witness?
A. My father.
Q. Now, you say that you did not hear any testimony of the other witness?
A. No, sir.
Q. Did you hear what took place on the stand?
A. No, sir.
Q. Did not hear what took place on the stand?
A. No, sir.
Q. Where were you at that time?
A. I was in the court, but I was in the far end of the room, away off from the witness stand.
116 Q. Do you recollect seeing Vehmeyer testify?
A. I saw him on the stand, but did not hear what he said.
Q. Do you recollect seeing Marshall testify?
A. I saw him on the stand.
Q. Do you remember seeing Eldridge testifying on the stand?
A. I could not say.
Q. Did they testify before or after you were called? Had you finished your own testimony before you went off to the far corner?
A. I was the last witness upon the stand.
Q. You think you was the last witness on the stand?
A. Yes, sir.
Q. You say you heard the judge talking. Was that after the jury came in?
A. That was after the jury came in.
Q. Were the jury there in the box, or were they in their seats or standing before him, or where were the jury?
A. The jury were in their seats.
Q. Do you remember whether there was any motion for a new trial?
A. No, sir; I did not hear any motion for a new trial.
Q. Were you ever present in the court-room after that time when this case was under consideration?
A. Not after that.
Q. Now, about this schedule, who made the schedule?
A. My father made it.

Q. Where was he when he made it?
A. I could not say. I saw the paper; I saw the statement.
Q. Did you see him make it?
—. It was his schedule; yes, sir.
Q. Did you see him make it?
A. I saw him make part of it; yes, sir.
Q. What part of it did you see him make?
A. Well, I could not tell you.
Q. Who made the other part of it?
A. Oh, he made it.
117 Q. Did you see him do it?
A. I saw him make part of it.
Q. Where did you see him make that part of it?
A. I could not tell you where.
Q. Did you read it?
—. I read a little of it.
Q. How did that happen?
A. I was looking over his shoulder.
Q. And you say you can't tell where your father was when he made it?
A. No.
Q. Did your father write it out?
A. Yes, sir.
Q. Anybody assist him—anybody help him?
A. Yes, sir; the attorney.
Q. What attorney?
A. I don't remember.
Q. How did the attorney assist him?
—. He drew up the schedule.
Q. I thought you said your father drew up the schedule?
A. The attorney drew up the schedule and he gave him the date to make it out.
Q. Was this in the court-room or was it somewhere else.
A. I could not tell where it was.
Q. Were you present in court when the bond was given?
—. No, sir.
Q. Were you present in the court at that time?
A. No, sir.
Q. Were you present in the court at any time when this matter was up?
A. Yes, sir.
Q. And you say no bond was given at the time you were present in court?
A. At the time of making the schedule.
Q. I did not ask that; I ask you if you were present in court when your father was told he might go?
A. Yes, sir.
Q. Was the schedule made in the court-room?
A. The schedule was on file; yes, sir.
Q. Did you read the schedule?
A. Part of it.

118 Q. Do you know whether that was a schedule or whether it was a petition made by your father to the judge of the county court?

A. A what?

Q. A petition for leave to schedule.

A. It was a schedule.

Q. How much of it did you read?

A. Well, I could not tell you.

Q. What do you remember of it?

A. I remember it was a schedule.

Q. You have said so three or four times, but I could tell best if I could have you state what it was that you read.

A. I don't remember.

Q. What was it you read in that paper?

A. I don't remember.

Redirect examination by Mr. ROBBINS:

Q. Where were you when you heard the judge discuss the question?

A. I was on the witness chair.

Q. When he discussed as to what kind of a judgment should be entered?

A. Yes, sir.

April 7, 1897.

THOS. J. MERRIFIELD AND
ROBERT S. HALL,
Att'ys for Def't J. Forsyth.

M. W. ROBINSON,
Att'y for Plaintiff.

119 Superior Court.

VEHMEYER
vs.
FORSYTH. } 131,807.

Stipulation as to Testimony of Robert C. Forsyth.

120 The COURT: When was that evidence admitted?

Mr. HALL: In 1894; the case was tried before Judge Payne. This is gotten up by the reporter, this transcript, by the reporter who took the case at that time, as the record.

Mr. MERRIFIELD: We will show that Judge Payne admitted it.

Mr. ROBINSON: We tried it on a different basis at that time; that part of the case was all erroneous.

Mr. HALL: The record in the other case shows this evidence was admitted by Judge Payne at that time.

The COURT: On what ground was that admitted; did you go into it?

Mr. ROBINSON: Yes; it was a mistake, though.

The COURT: I concede the defendant has got the right to meet and overcome any case that the plaintiff makes against him.

Mr. ROBINSON: I happened to take the view at that time that perhaps it was proper and correct to introduce testimony showing what the nature of the evidence on the former trial was.

The COURT: But, according to the view I have taken of it here, that evidence would not be competent.

Mr. MERRIFIELD: I was not present at the time, but I think it was admitted on the ground that the declaration as proven did not clearly show what the real subject of litigation was.

Mr. ROBINSON: No; it was admitted on the ground that we had gone into the nature of the testimony. I started it off on a sort of a theory that I would show not only the issues, but there was evidence introduced that tended to sustain the issues. It was a mistaken view of the law.

121 The COURT: If you do that, you have got to try that case all over again. If the case is in judgment, if that was a judgment in assumpsit, or a judgment in tort, why that is the question in this case here, to find out what kind of a judgment that was. There certainly were issues joined in that case, and a trial, on which trial evidence pro and con and the merits of the case were gone into, and it was merged in the judgment. Now, it does seem to me the only inquiry is here as to what kind of a judgment it was. If the judgment was in assumpsit, why this is barred by the discharge in bankruptcy. Now, if it is a judgment in tort for fraud, it is perhaps also barred by the discharge in bankruptcy; I won't undertake now to say that it is not. Have you more evidence, Mr. Hall?

Mr. HALL: Yes, as to the proceedings in the county court, I had intended to offer the evidence of Edward Longly, who was the deputy sheriff and had Mr. Forsythe in charge. Now, I offer to prove that Mr. Longley took Mr. Forsythe from the jail, where he was confined under this proceeding, and brought him into the court before Judge Wallace under an application to schedule, and by Judge Wallace did grant leave to schedule.

Mr. ROBINSON: You mean to prove the record by Longley?

Mr. HALL: I offer further to prove by Mr. Longley that Mr. Forsythe, after the hearing in the county court, was discharged, and that he let him go free. That is all of Mr. Longley.

Mr. ROBINSON: That is objected to. It is not the evidence of record and it is not in this case.

The COURT: I will sustain that.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

122 Mr. HALL: I intended to corroborate that testimony so far as possible by Mr. Hansporough, who signed the bond. I offer to prove by William Hansporough that at the time Mr. Forsythe made his application to schedule——

Mr. ROBINSON: Bring in Mr. Hansporough.

WILLIAM HANSBROUGH, a witness of lawful age, having been called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?
A. William Hansbrough.
Q. Do you know the parties to this suit?
A. Yes; I know Mr. Forsythe. I don't know Mr. Vehmeyer.
Q. Were you present in the county court in the month of August, 1871, when Mr. Forsythe was present in the custody of the sheriff?
A. I do not pretend to be accurate as to the date at all. At the time Mr. Forsythe was arrested I was present and gave a bond which was required from him in his making the schedule. I think it was upon the giving of that bond that the defendant, Mr. Forsythe, was discharged. I had no further business with him.
Q. What case was that in?
A. A suit of Vehmeyer's against Mr. Forsythe, in which suit he had obtained a judgment against Mr. Forsythe, and he had
123 been arrested, and it was *that* the giving of that bond that procured his release or satisfaction.
Q. Do you know whether or not Judge Wallace at that application decided the question as to whether or not Mr. Forsythe could schedule?

Mr. ROBINSON: That is objected to. That is not the way to prove the proceedings of court.
Mr. HALL: That, of course, would be in open court. The ruling of the court is open here.
Mr. ROBINSON: I object for other reasons.
The COURT: What are the other reasons?
Mr. ROBINSON: The other reason is that it is not of the issues of this case.
The COURT: It is not admissible under the pleadings?
Mr. ROBINSON: No.
The COURT: That applies, as I understood it, to all that *all that* took place in the county court; and did he pass on that question?
Mr. HALL: We will ask first if you remember what the condition of that bond was?
A. I do not know that; I do not know. I do not know what you mean by conditions.
Mr. ROBINSON: The words, the provisions, the thing- that were contained in the bond itself.
A. I don't recall what was contained in it. I know the result of it; Mr. Forsythe was to make a schedule.

Mr. ROBINSON: Wait. You are going entirely out of your element.
The COURT: What else is there?
Mr. HALL: I will offer to prove——
The COURT: Better ask the question.
124 Mr. HALL: I offer to prove now that Judge Wallace did discharge this defendant.
Mr. ROBINSON: And that he heard Judge Wallace say something.

Mr. HALL: Yes; that he heard Judge Wallace decide that Mr. Forsythe was entitled to schedule.

Mr. ROBINSON: This is objected to.

The objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Do you know why you signed that bond?

Mr. ROBINSON: Wait a moment; I object to that.

Objection sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Do you know why bond is required?

Mr. ROBINSON: I object to that.

The COURT: You can answer that by yes or no.

A. It was.

Mr. ROBINSON: Do you know—yes or no—why bond is required at all?

A. Yes.

Mr. HALL: Now, why?

Mr. ROBINSON: I object.

The COURT: As I understand, the position taken is that no evidence is competent about what took place in the county court, because here are no pleadings under which it would come in. It seems to be so. I do not see how evidence is competent, under pleadings as they stand, of what was done there.

125 Cross-examination by Mr. ROBINSON:

Q. Who asked you to go to the court-house to sign the bond?

A. Mr. Forsythe himself.

Q. Do you know what a recognizance is?

A. It means——

Q. Do you know what a recognizance is?

A. I was going to give you my idea. I do not know that I can give you the legal definition of it.

Q. Do you know what a bail bond is, where a party under arrest enteres into a recognizance, with certain surety, upon which he is allowed to go? Do you know what that is?

A. That means he is to be free upon the condition named in the bond.

Q. Do you recollect the amount of the bond?

A. I do not; it seems to me some $500.

Q. Do you know what the conditions of that bond were? Did you read it at the time, so as to know what the conditions were?

A. That he was to schedule.

Q. Do you know—do you now have a recollection of what the conditions were that were contained in that bond?

A. I would like to answer as well as I know how.

Q. The first thing I want to know is whether you know what the condition of the bond was.

A. I know the result of the bond.

Q. That is not the question. Do you know what was contained in the bond, the conditions of that bond—the conditions of your bond, which stated that whereas, etc.—if you know anything that was contained there?

A. I know that that bond required him to do certain things
126 within a given time; that is my understanding of it distinctly.

Q. It is your understanding of it by a subsequent conversation with Forsythe?

A. No, sir.

Q. The result was, Forsythe was released from arrest that time?

A. Yes, sir.

Q. And that is what the bond is given for, the recognizance, with you as surety?

A. Yes, sir.

Q. Do you recollect to what time that case -as continued?

A. No; I do not remember.

Q. You do not remember any of the continuances?

A. No, sir.

Mr. ROBINSON: That is all.

Whereupon court adjourned till 2 o'clock p. m.

2 P. M.

Court met pursuant to adjournment.
Same parties present.

JOHN MARSHALL, a witness of lawful age, being first duly called and sworn, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?

A. John Marshall.

Q. Where do you live, Mr. Marshall?

A. 5152 Emerald avenue.

Q. What was your business in the year 1871?

A. In 1871, I was in the Union stock yards—working in the Union stock yards.

127 Q. What was your business and employment in the years 1869 and 1870?

A. I was foreman out in Indiana.

Q. In whose employ were you in the years 1869 and '70?

A. Jacob Forsythe.

Q. The defendant in this case?

A. Yes, sir.

Q. Do you remember the case of Henry F. P. Vehmeyer against Jacob Forsythe, tried in the year 1871?

A. Yes, sir.

Q. Were you a witness in that case?

A. I was.

Q. In whose behalf?
A. Jacob Forsythe, I believe.
Q. Do you remember what your testimony was on the trial of that case?
A. I do not remember the evidence.
Q. Do you remember a part of it?
A. I remember some of it; yes, sir.
Q. What part of it do you remember?

Mr. ROBBINS: I object now.
The COURT: That will be the same question we had before. I sustain the objection.
To which ruling of the court defendant, by his counsel, then and there duly excepted.
Mr. HALL: I will offer to prove, then, as we have in the other cases, by this witness that he was a witness on behalf of Jacob Forsythe on the former trial of the case, and that in relation to the 200 cords of wood in question this witness testified that Mr. Forsythe did have that amount of cord-wood and more for a long time prior to this lawsuit, and at the time Vehmeyer wanted it or claims to have wanted it, and that he heard Vehmeyer swear on the trial of that case that he, Vehmeyer, had ordered Mr. Forsythe not to ship
128 any more of the wood; that Vehmeyer instructed this witness at Castell, Indiana, that he should not ship any more wood to Vehmeyer on account of Forsythe, and that this witness was then handling and cutting wood for Forsythe in the woods. That is all.
Mr. ROBINSON: I object to that offer, your honor; it is utterly unconscionable.
The COURT: The objection is sustained.
To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. ROBINSON: Were you not called as a witness on behalf of the plaintiff Vehmeyer on the trial of the original case?
A. I could not say that I was, sir, and I could not say that I was not.

The COURT: I want to know who this witness testified for.
Mr. HALL: I offered to ask him those questions.
The COURT: I understood this witness to testify that he testified for the plaintiff on the trial of the original case.
Mr. ROBINSON: He did.
The COURT: And did not testify for the defendant?
Mr. FAKE: Yes.
The COURT: Now, I understand that he testified for the defendant on the original trial.
Mr. ROBINSON (to the witness): Did you so testify?
The COURT: He says he don't remember a part of his evidence, but he remembers a part. (To Mr. Hall:) I understand you to say this witness testified on behalf of the plaintiff in the original trial of this case?
Mr. ROBINSON: He did.

129 The COURT: Then this court becomes interested in that question, whether this witness testified for the plaintiff on the trial of that case. I want to know what the fact is—not what he testified to, but whom he testified for?

Mr. ROBINSON (to the witness): The question was, Were you not called as a witness on the part of the plaintiff Vehmeyer on the trial of the original suit in 1871?

A. Yes; I believe I was; I believe I was.

The COURT: Well, were you called? Did you testify then for the defendant; did you testify for Forsythe then?

A. No, sir.

Q. You testified for Vehmeyer, didn't you?

A. Yes, sir.

Q. You testified for the plaintiff?

A. Yes, sir; that is right.

Q. How did you happen to say you testified for Forsythe?

A. Before Judge Payne.

The COURT: Did he testify before Judge Payne?

Mr. ROBINSON: He was called by the defendant before Judge Payne.

The COURT: Oh, well, that is all right.

Mr. FRAKE: Then these offers *is* all wrong?

Mr. HALL: No.

Mr. ROBINSON: Let everything stand as it goes in. I am satisfied with the record.

130 S. J. HARMON, a witness of lawful age, being first called and duly sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. HALL:

Q. Have you been sworn?

A. Yes, sir.

Q. What is your name?

A. Samuel J. Harmon.

Q. What was your business in 1871?

A. I was with with Kinney, Peck & King.

Q. What business were they in?

A. The law business.

Q. Do you remember the trial of a case of Henry F. P. Vehmeyer against Forsythe in that year?

A. I do, sir; part of it.

Q. Do you know who the attorneys for the parties to that suit were?

A. Mr. Robinson and Mr. Frake and Mr. Peck and Mr. King.

Q. Who did Mr. Peck and Mr. King represent?

A. Represented Mr. Forsythe.

Q. Were you present at the trial of that case?

A. Part of it, sir.

Q. Before what judge was it tried?

A. Porter.

Q. Was it tried by court or by jury?
A. By jury.
Q. At what part of the trial were you present?
A. Well, I was back and forwards from the office off and on.
Q. Were you present at the time the jury brought in its verdict in the case?
A. I was there part of the time; yes, sir.
Q. Part of the time?
A. Yes, sir.
Q. Do you remember whether or not the jury at any time after it had gone out asked the court for further instructions in the case?

Mr. ROBINSON: Wait a moment. We object. It is not the
131 right sort of evidence to prove anything that transpired—to prove any proceeding in court—the recollections of a by-stander.

Mr. HALL: It is a part of the record, and it is an item from which this court may decide what the character of that case was, and may decide whether or not the element of fraud was involved in the case. We contend that this court has a right to go into the facts that will enable him to find out what the true facts in that case were, because the record that they attempt to show the court does not show in so many words fraud upon its face.

The COURT: Well, it is the same thing we have had before; just the same thing we have had before.

Mr. ROBINSON: Certainly; trying to retry that case.

The COURT: It is the same thing, it strikes me, and I will have to rule the same as I did on all of them and sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted.

Mr. HALL: Will your honor allow the witness to answer the question subject to the objection instead of my making an offer? It will amount to the same thing.

Mr. ROBINSON: No; I object to it.

The COURT: That would be irregular. There are only the two ways of getting at it—ask the question and let the court rule on them, or make your offer as a whole.

Mr. HALL: I offer to show by this witness that after the jury had retired, on the original trial of this case, that they came out and asked the court as to whether or not they could find there was fraud
132 involved in the case, and that Judge Porter then instructed the jury that no fraud had been shown in the case, and that it was the duty of the jury simply to determine the amount, if any, which Forsythe owed to Vehmeyer.

Mr. ROBINSON: That offer is so utterly at variance with every experience and conception of how things transpired in the court-room I should feel inclined to object to any such offer as being such a monstrous perversion of the truth as not to be heard, even as an offer.

Mr. HALL: I offer to prove it by this witness.

Mr. ROBINSON: One of the objections is that this gentleman

frames anything in his mind as an offer. Of course, there is no jury to be affected. I do not think it will affect this court. I am sometimes pained in hearing his offers made up, thinking of what I know to be the facts in the case. That jury went back to get a piece of evidence that had been offered on the trial. After they got that evidence, they finished up their verdict in about two minutes. Everybody knows that the jury did not come back for further instruction, and even the court knows that the court would never venture to give that jury any instructions except in writing. It is so utterly wild-cat and preposte-ous, that offer.

The COURT: If that is received in evidence, we have got to go to what you suggest as counter to it, and a good many things, it seems to me, are incompetent in this case. It seems to me this case narrows itself down to just two questions and only two questions in it, and one is, What is the record? The other is, What is the effect on that record of that finding of a discharge in bankruptcy? Are not those the only two questions here?

Mr. HALL: Yes.

Mr. ROBINSON: It was only a trial on the record.

133 The COURT: I will sustain the objection to the offer and save your point.

To which ruling of the court the defendant, by his counsel, then and there duly excepted.

MARSHALL WAITE, a witness of lawful age, being first duly called and sworn on the part of the defendant, testified as follows:

Direct examination by Mr. HALL:

Q. What is your name?

A. My name is Marshall Waite.

Q. What is your business?

A. I am in the employ of the Title Guarantee and Trust Co. My part of the business is taking charge of judgment books.

Q. How long have you been employed in that capacity?

A. I entered the employ in 1869, and I have been with them and their successors, now the Title Guarantee and Trust Co., ever since. I have had charge of the judgment books most of the time. At intervals I have been out of work.

Q. Have you in your possession a judgment record from memoranda in the possession of Shortall & Howard covering the period of 1871?

A. I have.

Q. Is this the book?

A. This is the book.

Q. Will you refer to it, please? Have you got a record in that book relative to the case of Henry F. P. Vehmeyer against Jacob Forsythe?

Mr. ROBINSON: I object to that record.

Mr. HALL: I will use the word memorandum.

A. Yes, sir.

134 Q. When was that record or memorandum made?

A. Well, it was made at different times. I should explain that perhaps we took off the new suits every day, as they are filed at the time, and they are entered in our books here, the general number, the title of case, and afterwards the date of filing and such orders as they enter in the case we take at the time they are entered, so this entry is, of course, doubled; the title at the date of filing case, July 16th, 1870; then there is an entry of judgment on July 29th, '71.

Q. That was, of course, made at the time of the entry of judgment, and then the issuing of the execution on August 19th, '71, made on that date. Was the entire entry made out there at seperate times? Are there any other orders or memorandum by you upon that book with reference to this case?

A. Not in reference to this case.

Q. And is there any memoranda as to the character of the case? From the statement of the action in the column where the entry of the action or kind of case, what is that?

A. It is assumpsit.

Q. What does that record show as to the amount of the judgment?

A. It shows judgment, $833.35.

Q. Does your record show the number of the case?

A. It does.

Q. What is the number?

A. General number, 31053.

Q. And what court does it show that case in?

A. The superior court of Chicago.

Mr. HALL: If the court please, we offer that in evidence. I have had a copy of that record made, which is similar to the one offered by Mr. Robinson and made, I think, in the same handwriting. I offer it upon the same basis as Mr. Robinson made his offer.

Mr. ROBINSON: I suppose that would be fair in this case.

(Paper here marked by reporter Defendant's Exhibit 5, and was and is in words and figures following, to wit:)

Here insert Exhibit 5.

135

"EXHIBIT 5."

Superior Court of Chicago.

No. of case.	Name of parties.	Action.	When commenced.	Date of judgment.	Against whom.	Amount of judgment.	Record.	Fee book.	No. of execution.	Date of execution.
			July 16, 1870							
31,053	Henry F. T. Vehmeyer *vs.* Jacob Forsyth.	Assumpsit.		July 29, '71	Appeal allowed.	833 35		40,549	16,963	Aug. 19, 1871

136 STATE OF ILLINOIS, } ss:
County of Cook, }

Henry H. Handy, being first duly sworn, on oath states that the writing hereto attached is a true copy from a judgment docket formerly belonging to Shortall & Howard; that the minutes and extracts contained in said judgment docket were made from the records and files in the office of the clerk of the superior court of Cook county, Illinois, prior to the destruction of the records of Cook county, Illinois, which occurred on or about October 8 and 9, 1871; that said judgment docket containing said minutes and extracts was at the said date of the destruction of said records in the possession of persons who were then engaged in the business of making abstracts of title for others for hire, and that the said judgment docket containing the minutes and extracts from which the said copy is made is now in the possession of the Title Guarantee and Trust Company, of the abstract department of which company affiant is the manager.

HENRY H. HANDY.

Subscribed and sworn to before me this fifteenth day of June, A. D. 1897.

MAGNUS O. BENSON,
[SEAL.] *Notary Public, Cook County, Illinois.*

137 Mr. HALL: I will ask you, Mr. Waite, whether this transcript which we offer is a true and correct transcript of the entries made upon the book from which you are now testifying?

A. It is.

Q. Will you identify the original book of records here by number?

A. It is judgment docket No. 10 of the superior court.

Q. Whose property is that now?

A. The Title Guarantee & Trust Co.'s.

Q. And whose was it at the time those entries were made?

A. Shortall & Hoard's.

Cross-examination by Mr. ROBINSON:

Q. You did not mean this to be a judgment docket of the superior court?

A. No, sir.

Q. What did you mean?

A. I mean docket No. 10 of records, kept by Shortall & Hoard, of judgments in the superior court.

Q. You say that you made the entries of this book?

A. I made the entries of the judgment of the execution.

Q. I ask you did you make this entry in this book?

A. Not all of it.

Q. Did you make the entry of the number?

A. No, sir.

Q. Of the title of the case?
A. No, sir.
Q. Of the nature of the action?
A. No, sir.
Q. That is not made by you at all?
A. That is not made by me at all.
Q. What was your age in 1869?
A. In 1869—I was born in 1848; that would make me—I was just under 21.
Q. That was the beginning of your work in this line?
A. Yes, sir.
138 Q. Did you work at this work in 1869?
A. I think I begun with Shortall & Hoard in 1867 instead of 1869.
Q. I mean this work of abstracting court matters.
A. I was working at the time that the entry of that judgment was made, at the time this suit was filed here; when that suit was entered in, not in my handwriting; I was not working at the judgments then.
Q. At the time of the entry of the number of the case, the entitlement of the case and the nature of this case, you were not working at this work at all?
A. Not that part of the abstract business.

Redirect examination by Mr. HALL:

Q. Do you know in whose handwriting the number and title of the case and the character of it was made?
A. They were made by a gentleman by the name of Dearborn, who took my place for a few months and then left us. I don't know where Mr. Dearborn is now.
Q. Do you know that to be his handwriting?
A. I know that to be his handwriting.
Q. And his duties in respect to the records where the same is yours?

Mr. ROBINSON: Wait a moment. This comparison I object to. What were his duties in respect to this record?
A. They employed him; he was employed by Shortall & Hoard, with whom I was employed, and I instructed him in his work, and I know what his duties were, the same as those I testified to as being my own duties when I was doing that work.

139 Mr. HALL: Now, if the court please, I desire to offer in evidence sections 5117 of the bankruptcy act of the United States; also sec. 5119 and also sec. 5067. I have a correct transcript of those sections, if the court desires to see them.
The COURT: Well, you might let me take them. Sec. 5117, 5119, and 5067?
Mr. HALL: Yes; and I will hand those up to the court with the other propositions of law.

Whereupon defendant rested his case.

And the plaintiff, to further maintain the issues on his part, in rebuttal offered the following testimony, to wit:

JAMES FRAKE, a witness in rebuttal on behalf of the plaintiff, testified as follows:

Direct examination by Mr. ROBINSON:

Q. You have already testified in this case?
A. I have.
Q. Did you hear the testimony of Mr. Hansbrough offered on behalf of the defendant?
A. I did.
Q. Were you present at the time of the filing of the bond in regard to which he testified?
A. I was.
Q. Do you know what that instrument was and what it contained?
A. I do.
Q. What was it?
A. It was a recognizance for the appearance of Mr. Jacob Forsythe on the 12th day of October, 1871, and only that.
Q. He spoke of Mr. Forsythe being discharged. Was he discharged except upon that recognizance?
A. That was all.
140 Q. At what time was this case continued—to what time was the recognizance?
A. To the 12th day of October, 1891.
Q. You don't mean 1891?
A. 1871.
Q. The 12th day of October, 1871?
A. Yes; the Wednesday after the fire.
Q. Was there anything referring to a schedule or scheduling contained in that recognizance?
A. Nothing whatever.
Q. No reference to a schedule contained in the recognizance?
A. No, sir.

Cross-examination by Mr. HALL:

Q. When was Mr. Forsythe arrested?
A. About the middle or latter part of September, 1871.
Q. Didn't you state in your direct examination it was in August?
A. No, sir; I did not.
Q. You did not?
A. No, sir; I did not. At least I did not intend to. I said the writ was issued.
Q. Do you remember when the writ issued?
A. I told you in my former evidence that it issued somewhere toward the middle of August.
Q. Now, how long after that was it before Mr. Forsythe was arrested?
A. It was sometime after that.
Q. How long?

A. Well, I should say a month afterwards.
Q. A month afterwards?
A. Or perhaps a little more than a month.
Q. That would bring it to the latter part of September?
A. Yes, sir.
Q. Of 1871?
A. Yes, sir; the latter part.
Q. How long after Mr. Forsythe was arrested on this alleged writ was it before he went into the county court and asked for his discharge?

A. He went in the next morning.
141 Q. The next morning?
A. Yes; I think; my remembrance is that he staid in jail one night.
Q. That is, as you recollect it, he was discharged the latter part of September?
A. He was not discharged at all.
Q. He filed this bond you mentioned the latter part of September?
A. Yes.
Q. What was the condition of that bond?
A. That he should appear on the 12th day of October, 1871, at an hour fixed in the bond, and the question of his right to schedule was then to be heard, he claiming right to schedule and I denying his having the right to schedule.
Q. Was there any hearing on the petition the first time Mr. Forsythe went in?
A. No hearing whatever.

Mr. HALL: That is all.

The COURT: When was it that he was to appear?
A. The Wednesday after the fire, in 1871.
Mr. ROBINSON: I wish to ask one or two questions more of this witness.
Q. Have you made a computation or a calculation of the interest upon that judgment?
A. I have.

Mr. HALL: I object to that.
Mr. ROBINSON: It is a mere statement of computation.
Mr. HALL: This is a part of his original case.
The COURT: No; it is not a part of his case. They never interpose any objection to that kind of evidence which is of any assistance to the court. The court or jury may take any computation for what it is worth; they are not bound by it. You may tell if you made a computation.
To which ruling of the court defendant, by his counsel, then and there duly excepted.

142 The WITNESS: I computed the interest on the judgment from July 29th, 1871, to the first day of July, 1893, at six per cent.
Mr. ROBINSON: Do you mean 1893?

A. 1873—no, 1893; that is what I mean.

The COURT: July 29th, 1871.

A. To July 1st, 1893, at 6 per cent.; that amounts to $995.80. I computed the interest from July 1st, 1893, under the original judgment, to the present time——

The COURT (interrupting): What do you mean, $995.80? You do not mean that that is the amount?

A. No; I did not.

The COURT: That is simply the interest?

A. That is simply the interest; I computed the interest on the judgment from July 1st, 1893, to the present time, at 5%. That amounts to $246.94, the original judgment being $833.35, making a total of $2,076.90 to date.

The COURT: Well, that's all. I will tell you what you would better do, gentlemen. Have you got any propositions of law?

Mr. HALL: Yes, sir.

The COURT: Well, let me have them. Where are those sections of the bankrupt act; let me have them also. Now, if you want to give me any authoritives as to whether this discharge operates as a bar to this claim, let me have them; let me have those authorities and I will look them over, and I will fix on a time when you may come in and I will give you a hearing. I think we better put it down at nine o'clock. No; I will put it down on my call as a case, and will, when reached, dispose of it. I will put it on this call, gentlemen, anywhere where you say.

Mr. HALL: We can be ready by Monday.

143 The COURT: I will put it right on after the Jansen case, this case that is on trial.

Mr. FRAKE: I meant 1891 instead of 1893.

The COURT: And then at 5 %?

Mr. FRAKE: Yes; from 1891.

The COURT: From July, 1891, at 5 %?

Mr. FRAKE: Yes, sir.

By leave and direction of the court evidence was allowed and directed to be offered upon the question of payment or satisfaction of the judgment sued on in this action; and thereupon M. W. ROBINSON was duly sworn and offered as a witness upon the part of the plaintiff and testified as follows:

My name is M. W. Robinson. I am now and was in 1871 an attorney-at-law, and have been practicing at this bar for the past 32 years. I assisted Mr. James Frake in the trial of the original suit of Vehmeyer *vs.* Forsythe, in which the judgment in question, rendered in 1871 and sued on in this case, was obtained, and have been familiar with the history of the case ever since.

No part of the said judgment sued on in this had ever been paid or in any way satisfied.

Which was all the evidence given, received, or offered in the before-entitled cause.

And thereupon the defendant, by his counsel, submitted to the

court the following propositions to be held in the decision of this case:

The defendant submits to the court the following propositions to be held by the court as the law of the case, to wit:

144 First. The court finds as a matter of law that the judgment sued on was neither founded upon fraud or embezzlement, within the meaning of these word- in section 5117 of the Revised Statutes of the United States, but that the same was

Refused. provable in bankruptcy against the defendant and was wholly released and discharged by the discharge in bankruptcy evidenced by the certificate introduced in evidence by the defendant.

Second. The court finds as a matter of law that even if the judgment sued on was found- upon a tort, such tort was merged in the judgment, and such judgment was therefore provable

Refused. under the bankruptcy act of the United States and was wholly discharged by the discharge in bankruptcy of defendant, the certificate of which has been introduced in evidence by the defendant.

Third. The court finds as a matter of law that the evidence introduced by the plaintiff of the declaration in the suit

Refused. in which the judgment sued on was rendered shows the declaration to have been substantially in assumpsit and not a case in tort.

Fourth. The court further finds that "fraud," in the act of Congress defining the debts from which a bankrupt is not relieved, means positive fraud or fraud in fact, involving moral

Held. turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

Fifth. The court finds that if there were any fraud at all in the transaction on which the judgment sued on was

Refused. founded, it was implied fraud or fraud in law, and not fraud in fact, involving moral turpitude or intentional wrong.

Sixth. The court further finds as a matter of law that parol

145 evidence is not admissible to prove the record of the judgment sued on, inasmuch as the same was destroyed by

Refused. fire and has not been restored, as it might have been under the statutes of this State.

Seventh. The court further finds that the evidence of the plaintiff as to what the record of the judgment really was

Refused. is too indefinite and uncertain to establish the same, and the finding should therefore be for the defendant.

Eighth. The court further finds that the evidence as to what the declaration contained in the original action in which

Refused. this judgment was rendered does not show a cause of action for deceit or fraud in fact, but merely a cause of action in assumpsit.

Ninth. The burden of showing that the alleged judgment sued

on was found- upon a positive act of fraud, partaking
Held. of moral turpitude and intentional wrong, lies upon the plaintiff.

Tenth. The burden of showing that the alleged
Held. judgment sued on was never paid or satisfied is upon the plaintiff.

Eleventh. The court further finds as a matter of law
Refused. that under all of the evidence in this case the plaintiff cannot recover.

Twelfth. The court finds as a matter of law, from all of the evi-
dence in this case, that the judgment here sued on was
Refused. not founded upon any fraud practiced by the defendant upon the plaintiff.

Thirteenth. The court finds as a matter of law that the decree of
the county court allowing Forsyth to schedule is con-
Refused. clusive between the parties to this suit, as far as the question of fraud as an element in said judgment is concerned.

146 Fourteenth. The court finds that the certified copy of the
discharge in bankruptcy offered by the defendant is
Refused. an absolute defense to this suit, and that therefore the plaintiff cannot recover.

Fifteenth. The court finds that no parole evidence tending to
prove the record of the judgment sued on is admissi-
Refused. ble in this suit, and that the record should first have been restored, as directed by section 2 of chapter 116 of the statutes.

And thereupon the court marked "held" and held as law in the decision of said case the following of said propositions, to wit:

Propositions numbered fourth, ninth, and tenth.

And thereupon the court marked "refused" and refused to hold as law in the case the following of said propositions of law, to wit:

Propositions numbered first, second, third, fifth, sixth, seventh, eight-, eleventh, twelfth, thirteenth, fourteenth, and fifteenth.

To which ruling and decision of the court in refusing to hold said last-mentioned propositions as law in the decision of said case the defendant, by his counsel, then and there duly excepted.

And thereupon the court found the issues for the plaintiff, and entered a finding in favor of said plaintiff for the sum of $833.35, debt, and $2,076.90 damages entire.

To which rulings and findings of the court in finding the issues for the plaintiff and also in assessing the plaintiff's damages, as aforesaid, and to each of said rulings and findings the defendant, by his counsel, then and there duly excepted.

And thereupon the defendant, by his counsel, then and there moved the court to set aside the finding so rendered and to grant a new trial of said case, and filed the following motion for a new trial, in writing, to wit:

147 STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

VEHMEYER *vs.* FORSYTH. } Gen. No., 131,807.

And now comes the said defendant, Jacob Forsyth, by Thomas J. Merrifield and Robert G. Hall, his attorneys, and moves the court to set aside the finding made herein against the said defendant, and demands a new trial in this cause for the following reasons:

1st. There is no evidence that the alleged judgment on which this suit was brought was ever recorded in the record prescribed by the statutes for the recording of judgments.

2nd. There is no evidence showing that the verdict of the jury in which the judgment sued on is alleged to have been recovered was ever returned into court.

3rd. The evidence of the plaintiff is too uncertain, vague, and indefinite to establish the existence of the alleged judgment sued on.

4th. The evidence of the plaintiff, being all by parol, is not sufficient to establish the existence of a destroyed record.

5th. It was incumbent upon the plaintiff to restore the record of the alleged judgment under and pursuant to the provisions of section 2 of chapter 116 of the statutes of this State before proceeding to a trial upon the alleged judgment.

6th. The court erred in admitting parol evidence on the part of the plaintiff tending to prove the record of the judgment.

148 7th. The court erred in refusing to admit proper evidence offered by the defendant tending to prove the nature and character of the cause of action sued on in the original suit in 1871.

8th. The court erred in finding for the plaintiff and in entering judgment against the defendant.

9th. The finding is against the law and evidence.

10th. The court should have held the propositions of law numbers 1, 2, 3, 5, 6, 7, 8, 11, and 12, 13, 14, and 15 to be the law of the case.

11th. There is no proof that the judgment sued on was founded upon fraud within the meaning of this word in section 5117 of the Revised Statutes of the U. S.

12th. The court erred in refusing to permit Jacob Forsyth to testify to the facts involved in and upon which the original suit was founded.

13th. The court erred in rejecting the statement of account signed by Vehmeyer and the letter of Vehmeyer offered by the defendant.

14th. The court erred in refusing to permit Marshall and Jacob Forsyth to swear to the effect that *that* there were 200 cords of wood ready for delivery to Vehmeyer at the time the declaration alleges that Forsyth refused to deliver said wood.

T. J. MERRIFIELD AND
ROBERT G. HALL.

149 But the court denied the motion for a new trial and gave judgment on the finding against the defendant; to which rulings and decisions of the court in denying said motion for a new trial and in giving judgment against the defendant the defendant, by his counsel, then and there duly excepted.

And thereupon the defendant, by his counsel, on June 24th, A. D. 1897, prayed an appeal to the appellate court in and for the first district of Illinois; which prayer was granted by the court upon the defendant filing his appeal in the penal sum of twenty-five hundred dollars in twenty days and his bill of exceptions in thirty days from said 24th day of June, A. D. 1897.

And on July 23rd, A. D. 1897, this cause came on for hearing on the motion of defendant to have his bill of exceptions settled, signed, and sealed by the judge who tried said cause, and thereupon the court entered an order herein extending the time to present and file said bill of exceptions five days from July 23rd, A. D. 1897.

And forasmuch as the matters above set forth do not fully appear of record in this case, the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed by the judge of this court, pursuant to the statutes in such case made, which is done accordingly this 27th day of July, A. D. 1897.

JONAS HUTCHINSON, [SEAL.]
Judge Superior Court, Cook Co., Ill.

150 Superior Court.

VEHMEYER *vs.* FORSYTH. } 131,807.

Bill of Exceptions of Defendant.

Filed July 27, 1897.
JOHN A. LINN, *Clerk.*

ROBERT G. HALL AND
T. J. MERRIFIELD.
Att'ys for Def't.

And heretofore, to wit, on July 9th, A. D. 1897, there was filed in the office of the clerk of said court a certain appeal bond, which is on the words as follows, to wit:

151 *Appeal Bond, Appellate Court.*

Know all men by these presents that we, Jacob Forsyth, as principal, and American Surety Company of New York, as surety, of the county of Cook and the State of Illinois, are held and firmly bound unto Henry F. T. Vehmeyer, also of the same county and State, in the penal sum of twenty-five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this first day of July, A. D. 1897.

The condition of the above obligation is such that whereas the said Henry F. T. Vehmeyer did, on the 24th day of June, A. D. 1897, in the superior court of Cook county, in the State aforesaid, and of the June term thereof, A. D. 1897, recover a judgment against the above-bounden Jacob Forsyth for the sum of two thousand and seventy-six dollars and ninety cents, besides costs of suit, from which said judgment of the said superior court of Cook county the said Jacob Forsyth has prayed for and obtained an appeal to the appellate court within and for the first district in said State:

Now, therefore, if the said Jacob Forsyth shall duly prosecute his said appeal with effect and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

JACOB FORSYTH. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By JOSEPH T. BOWER. [SEAL.]
Attest: DANIEL T. HUNT. [SEAL.]

O K.
M. W. ROBINSON,
Att'y for Pl'ff.

Approved:
JOHN A. LINN,
Judge Superior Court of Cook County.

152 STATE OF ILLINOIS, } ss:
County of Cook, }

I, John A. Linn, clerk of the superior court of Cook county, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record, except the bill of exceptions, the original of which is, by stipulation of the parties, incorporated herein and made a part thereof, in a certain cause lately pending in said court, on the law side thereof, wherein Henry F. Vehmeyer was plaintiff and Jacob Forsyth defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 11th day of September, A. D. 1897.

JOHN A. LINN, *Clerk.*

Paid $10.00.

153 In the Appellate Court of Illinois, First District, October Term, A. D. 1897.

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } Appeal from Superior Court, Cook County.

Assignment of Errors.

Appellant assigns the following grounds of error:
The superior court erred—
1st. In assessing damages not claimed by appellee.
2nd. In assessing damages in excess of the amount of damages proven.
3rd. In overruling appellant's motion for new trial.
4th. In rendering judgment against appellant for $20.76 damages in addition to $833.35, debt.
5th. In admitting improper evidence on behalf of the appellees.
6th. In rejecting proper evidence offered on behalf of the appellant.
7th. In refusing to hold propositions of *how* numbered first, second, third, sixth, seventh, eight-, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, submitted by the appellant.
8th. In finding for the appellee instead of for the appallant.
9th. In sustaining plaintiff's demurrer to defendant's additional pleas, filed January 28th, 1896.
10th. In excluding the evidence of Samuel J. Harmon, offered by defendant.

THOMAS J. MERRIFIELD AND
ROBERT G. HALL,
Attorneys for Appellant.

154 In the Appellate Court, First District, Illinois.

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } No. 7368. Appeal — Cook Superior. Error — Cook.

I, Thomas N. Jamieson, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked A is the original transcript of record filed in said appellate court on the 5 day of October, A. D. 1897, by said appellant.
In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 18 day of May, A. D. 1898.

THOMAS N. JAMIESON,
[SEAL.] *Clerk of the Appellate Court,*
First District, Illinois.

155 At a term of the appellate court begun and held at Chicago, on Tuesday, the first day of March, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the first district of the State of Illinois.

Present: Hon. Francis Adams, presiding justice; Thomas G. Windes, justice; Nathaniel C. Sears, justice; Thomas N. Jamieson, clerk; James Pease, sheriff.

Be it remembered that on the 1 day of November, A. D. 1897, it being one of the days of the November term, A. D. 1897, certain proceedings were had in said court and entered of record in words and figures following, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

This day came the appellee, by his counsel, and moved the court to extend the time to November 20th, A. D. 1897, in which to file his briefs in said cause, and that the appellant may have to November 30th, A. D. 1897, in which to file his reply briefs in said cause, as per stipulation filed herein; and the court, being fully advised in the premises, doth order that said time be, and the same is hereby, extended.

And afterwards, on the 29th day of November, A. D. 1897, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

This day came appellant, by his counsel, and moved the court to extend the time until December 10th, A. D. 1897, in which to file his reply briefs in said cause, as per stipulation filed herein; and the court, being fully advised in the premises, doth order that said time be, and the same is hereby, extended.

156 And afterwards, on the 14th day of March, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

This cause, having this day been reached in the call of the docket, was argued by counsel for appellees, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And afterwards, on the 18th day of April, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } No. 7368. Appeal, Superior.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error, therefore it is considered by the court that the judgment aforesaid be affirmed, with directions to the trial court to enter a like remittitur in that court; and it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, on the 5th day of May, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } 7368. Appeal, Superior.

157 This day came appellant, by his counsel, and moved the court for an appeal from the order and judgment of this court in said cause to the supreme court of Illinois; and the court, being fully advised in the premises, doth order that an appeal be allowed herein to the said supreme court, on condition that appellant doth within twenty days from this date execute and file in said cause a good and sufficient appeal bond, conditioned according to law, in the penal sum of twenty-five hundred dollars, with surety to be approved by the court.

And afterwards, on the 16th day of May, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

JACOB FORSYTH
vs.
HENRY F. T. VEHMEYER. } No. 7368. Appeal from Cook Superior.

This day came appellant, by his counsel, and presented his certain appeal bond in said cause in the penal sum of twenty-five hundred dollars, with American Surety Company of New York as surety thereto; and the court, being fully satisfied as to the *the* qualifications of said surety, doth order that said appeal bond be, and the same is hereby, taken, approved, and filed herein.

And afterwards, on the same day, to wit, the 16 day of May, A. D. 1898, an appeal bond was filed in said cause; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Jacob Forsyth, as principal, and American Surety Company of New York, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto Henry F. T. Vehmeyer, also of the same county and State, in the penal sum of twenty-five hundred dollars, lawful mo-ey of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 14th day of May, A. D. 1898.

The condition of the above obligation is such that whereas the said Henry F. T. Vehmeyer did, on the 24th day of June, A. D. 1897, in the superior court of Cook county, in the State aforesaid, and of the June term thereof, A. D. 1897, recover a judgment against Jacob
158 Forsyth for the sum of two thousand and seventy-six dollars and ninety cents, besides costs of suit, from which said judgment of the superior court of Cook county the said Jacob Forsyth prayed for and obtained an appeal to the appellate court within and for the first district of said State; and whereas the said appellate court did, on the 18th day of April, A. D. 1898, and at the March term thereof, A. D. 1898, affirm the judgment of the superior court aforesaid, and did render judgment against the above-bounden Jacob Forsyth for costs of suit, from which order of affirmance and judgment of the said appellate court the said Jacob Forsyth has prayed for and obtained an appeal to the supreme court of the State of Illinois:

Now, therefore, if the said Jacob Forsyth shall duly prosecute his said appeal with effect, and, moreover, pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him, said Jacob Forsyth, in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

JACOB FORSYTH. [SEAL.]
AMERICAN SURETY COMPANY [SEAL.]
[SEAL.] OF NEW YORK.
By JESSE SPALDING, *Res. Vice-Pres't.* [SEAL.]

Attest: FREDERICK F. NORCROSS, *Res. Ass't Sec'y.*

Approved May 16, 1898.
F. ADAMS, *Judge, etc.*

O K.
M. W. ROBINSON,
Att'y for Appellee.

I, Thomas N. Jamieson, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all

other proceedings and appeal bond of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said appellate court, at Chicago, this 16 day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

[COURT SEAL.] THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

159 In the Supreme Court of Illinois.

JACOB FORSYTH, Appellant,
vs.
HENRY F. T. VEHMEYER, Appellee. } Appeal from Appellate Court, First District.

The appellant says there is manifest error in the within record, in this:

1st. In holding that the judgment in question was recovered for fraud of appellant, and that his discharge in bankruptcy did not discharge him therefrom.

2nd. That the declaration given in evidence is in tort for false and fraudulent representations of appellant.

3rd. In holding the allegation that the representations were false and fraudulent implies that appellant knew of their falsity.

4th. In finding that the evidence was sufficient to prove the former existence of the record of the judgment sued on, and that it was destroyed by fire in October, 1871.

5th. In holding that the amended declaration might be regarded as an additional count, and the *ad damnum* in the original as applying to the latter declaration.

6th. In holding that as there was no specific objection made to the amended declaration for want of an *ad damnum* in the trial court, nor any motion made in arrest of judgment, that the objection therefor was unavailing in the appellate court.

7th. In ignoring the objection made by appellant that there was a variance between the amount of the debt as alleged in the declaration and the amount as shown by the evidence.

8th. In affirming the judgment of the superior court instead of reversing it.

9th. In rendering judgment in favor of appellee and against appellant.

10th. In confirming the ruling of the trial court in excluding the evidence offered to be proved by Jacob Forsyth, S. J. Harmon, and John Marshall and by the documents set forth as Defendant's Exhibits No. 1 and 2.

THOMAS J. MERRIFIELD AND
ROBERT G. HALL,
Att'ys for Appellant, Jacob Forsyth.

160 And afterwards, to wit, on the 18th day of June, A. D. 1898, certain proceedings were had and orders made and entered by said court, among which is the following, viz:

JACOB FORSYTH *vs.* HENRY F. T. VEHMEYER. } Appeal from Appellate Court of Illinois, First District.

Now, on this day, come the parties hereto; and this being one of the days set apart for the call of the docket under the rules of this court and it appearing to the court that appellant hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, *and* said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

161 At a supreme court begun and held at Springfield, on Tuesday, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the twenty-fourth day of October, A. D. 1898, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

JACOB FORSYTH *v.* HENRY F. T. VEHMEYER. } No. 321. Appeal from Appellate Court of Illinois, First District.

And now, on this day, this cause having been argued by counsel and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court, now here, that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that in that record there is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in

all things and stand in full force and effect notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellee recover of and from the said appellant his costs by him in this behalf expended, and that he have execution therefor.

162 At a supreme court begun and held at Springfield, on Tuesday, the 4th day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice: Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the 24th day of October, 1898, the opinion of the court was filed in the words and figures following, to wit:

JACOB FORSYTH *vs.* HENRY F. T. VEHMEYER. } No. 195. Error to —. Appeal from First District.

163 Docket No. 321. Agenda 40. Northern Div. June, '98.

JACOB FORSYTH *v.* HENRY F. VEHYMEYER.

Per Curiam:

This case is brought by appeal from the appellate court for the first district. The opinion of that court, by Adams, P. J., is as follows:

"This is an appeal from the judgment rendered in an action of debt on a judgment. The declaration is in the usual form in such cases, and alleges that at the July term, 1871, of the superior court of Cook county the plaintiff (appellee) recovered a judgment against the defendant (appellant) for the sum of $833.35 damages and costs, the costs amounting to $6.75; that the record of the said judgment was destroyed by fire in October, 1871, and was not in existence at the time of the commencement of this suit. The appellant pleaded a discharge in bankruptcy in December, 1890, to which plea the plaintiff replied, in substance, as follows: That the action in which the judgment sued on was rendered was brought to recover damages sustained by the plaintiff by fraud of defendant, by which plaintiff was induced to pay to defendant about $1,200 by false and fraudulent representations of defendant that he owned and had in his possession, ready for delivery, about six hundred cords of wood in Lake county, Indiana; that said action was founded solely upon

fraud of defendant; that issue was joined in said action upon allegations made by the plaintiff in this declaration, and there being a jury trial, a verdict was returned in favor of the plaintiff, and against the defendant, for $833.35, as plaintiff's damages by reason of said fraud of defendant; that the judgment sued on was rendered upon said verdict and was founded solely upon fraud. To this replication defendant filed a rejoinder substantially traversing all of its material allegations. The case was tried by the court, by agreement of the parties, without a jury.

"The appellee called as a witness James Frake, an attorney, who testified that he brought the suit in which the judgment sued on was rendered, and drew the declaration to which the defendant pleaded not guilty; that he kept a docket, which he still had, in which he made entries of all steps taken in the case; that the suit was brought July 16, and the declaration, of which he had
164 not preserved a copy, was filed July 21, 1870; that the verdict was rendered May 9, 1871, and that the judgment was rendered July 29, 1871. The witness further testified that there was a formal verdict of guilty, assessing the plaintiff's damages at the sum of $833.35, signed by the foreman, and also that there was the usual judgment on such verdict, giving the form, and that about a month after the verdict was rendered he examined the records in the case, including the record of the judgment, and that the same were burned by the Chicago fire of October 8, 1871.

"Appellant's counsel contended, on the trial, that it was not competent to prove by parol the contents of the burned record; that it was incumbent on appellant to restore the record in the manner prescribed by the statute, and the admission of the oral testimony to prove the record is assigned as error, but as they have not urged this objection in argument we might consider it waived. On a former appeal in this case the court held against the contention that such proof is incompetent. *Forsyth v. Vehmeyer*, 55 Ill. App., 223. See, also, Black on Judgments, sec. 969, and cases cited; Freeman on Judgments, sec. 407; 1 Greenleaf on Evidence, sec. 509; *Mandville v. Reynolds*, 68 N. Y., 528; *Ashley v. Johnson*, 74 Ill., 392. Numerous other authorities might be cited to the same effect.

"The rule that the record, or an exemplified or sworn copy thereof, must be produced, is limited to cases in which it is within the power of the party relying on the record to produce such evidence. 1 Greenleaf on Evidence, sec. 86; 2 Jones on Law of Evidence, sec. 641.

"In *Church v. Hubbard*, 2 Cranch, 178, Marshall, C. J., delivering the opinion, says: 'The principle that the best testimony shall be required which the nature of the thing admits, or, in other words, that no testimony shall be received which presupposes better testimony attainable by the party who offers it, applies to foreign laws as it does to all other facts.'

"The statutory method of proving statutory records does not preclude proof by parol. *Mably v. Watts*, 98 N. C., 284; *Clifton v. Fort*, *id.*, 173.

"In *Weatherheads v. Baskerville*, 11 How., 329, the court said: 'A

rule in respect to judicial records is, that before inferior evidence can be received of their contents the loss of their existence must be clearly accounted for. It must be shown that there was such
165 a record; that it has been lost or destroyed, or is otherwise incapable of being produced, or that its mutilation from time or accident has made it illegible.'

"It is objected that even though the evidence was competent, it was insufficient to prove the record of the judgment. In addition to the testimony of the witness Frake that he saw and examined the record of the judgment, R. R. Stevens, formerly in the employ of Chase Bros. & Co., abstract-makers, being called as a witness, produced a book in which he had made entries of all proceedings in the suit in which the judgment sued on was rendered. He testified that the facts were taken from the original files and records, and were correct. These entries showed the title of the suit, the name of the action ('trespass on the case), when the suit was commenced, and the date and amount ($833.35) of the verdict, a motion for a new trial, the overruling of the motion July 29, 1871, and judgment on the verdict, etc. The witness further testified that he obtained the entry of the judgment in the first place from the clerk's minute book, and subsequently compared it with the record. He also testified that the originals from which the entries were made were destroyed by the great fire of October, 1871. A paper was admitted in evidence, by agreement of counsel, showing the entries made by the witness, which will be better understood by an examination of the record than as printed in the abstract. We think the evidence sufficient to prove the former existence of the record of the judgment, and that it was destroyed by fire in October, 1871.

"Appellant claims that by his discharge in bankruptcy, which was put in evidence, he was discharged from the judgment sued on. His contentions under this claim are: First, that the action in which judgment was rendered was assumpsit; secondly, if it was an action in tort for fraud, the declaration was defective in not alleging knowledge on his part of the falsity of the representations alleged to have been made by him; thirdly, that even though the gist of the action was fraud, the fraud was merged in the judgment, and his discharge in bankruptcy operated to discharge him from the judgment.

"The witness Frake testified, as before stated, that the original declaration was destroyed by the October fire of 1871; that he had no copy of it; that it contained only one copy; that he knew
166 the substance of it, and that before the former trial of this case, in the fall of 1893, he drafted what was a substantial copy of it, which he then had in court. The witness then testified that the declaration, in substance, was as follows:

"'Superior court of Cook county. To the July term, or of the August term, 1870. County of Cook and State of Illinois. Henry F. T. Vehmeyer (by Buschnell & Frake, his attorneys), complainant, complains of Jacob Forsyth, defendant, summoned, etc., in a trespass on the case. For that whereas, heretofore, to wit, on the 10th day of August, 1868, in order to induce plaintiff to advance him a

large amount of money, to wit, the sum of $1,500 (I think the declaration would say $1,200), falsely and fraudulently represented unto the plaintiff that he had a large amount of birch cord-wood, to wit, two hundred cords, cut and piled up near the Pittsburgh and Ft. Wayne, in the county of Lake and State of Indiana, ready to be shipped to Chicago; that said wood was contracted, or rather, perhaps, one Eldridge had contracted to purchase said wood at $6 per cord in the city of Chicago, when shipped, and that if Vehmeyer, the plaintiff, would advance to him at the rate of $5 per cord for the two hundred cords of wood, he, the defendant, would immediately—well, the defendant would immediately ship said cord-wood to the city of Chicago; that the plaintiff, Vehmeyer, relying upon the representation being true, advanced to the defendant the said sum of (I think the declaration said the sum of $1,200 or $1,000); that the defendant shipped only the sum of forty cords of wood to the said Eldridge, from which he, the said Vehmeyer, received the sum of $6 per cord (I don't know whether it is right or not); that the representations of the defendant, falsely, were false and fraudulent; that he did not have nor never did have in the county of Lake and State of Indiana two hundred cords of birch cord-wood piled up and ready for shipment to the city of Chicago to said Eldridge, but only had—neither in the county of Lake nor anywhere else—the sum of forty cords of birch cord-wood which was shipped by the said defendant to the said Eldridge. Wherefore the plaintiff asks damages to the extent of ($1,500 was the amount that was alleged in the declaration), and hence he brings this action of fraud and deceit against the defendant.'

"The witness was not allowed to read from the paper which
167 he had prepared before the former trial and which he said was a substantial copy of the written declaration, and was frequently interrupted in testifying as to the declaration. The declaration testified to is too plainly in tort for false and fraudulent representations to require argument. The allegation that the representations were false and fraudulent implies that appellant knew of their falsity. The same objection was made in *Merwin v. Arbuckle*, 81 Ill., 501, and *Nolte v. Reichelm*, 96 *id.*, 425, with reference to instructions, and the court in the latter case says: 'It is next contended that appellee's instructions 2 and 3 are erroneous, for the reason that they do not inform the jury that the false representation must have been knowingly made.' The instructions in express terms informed the jury that the representations, to be actionable, must have been fraudulently made. The same objection was urged to an instruction in *Merwin v. Arbuckle*, 81 Ill., 501, and it is there said: 'As the *scienter* enters into and is necessary to a fraudulent representation, the instruction virtually informed the jury that the representations must have been made knowing them to be false. Then, when they were informed that they must have been fraudulent, they were, in substance, told they must have been not only false, but plaintiff in error knew it.' But even though an express allegation of the *scienter* were necessary, its omission would be cured by the verdict. *Gerke v. Fancher*, 158 Ill., 375; *Dana v. Koltman*, de-

cided at the October term of this court, Gen. No. 6887; *Illinois Central Railroad Co. v. Simmons*, 38 Ill., 242, and other cases.

"The bankruptcy act, under which appellant's discharge was granted, provided: 'No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy, but the debt may be proved and the dividend thereon shall be a payment on account of such debt.' (Bump on Bankruptcy, 741.) Whether the judgment sued on was for fraud is a question to be determined from the record. (*Flannagan v. Pearson*, 14 Nat. Bank. Reg., 37; 42 Tex., 1.) We think it clear that the judgment in question was recovered for fraud of appellee, and that his discharge in bankruptcy did not discharge him therefrom. Bump on Bankruptcy (10th ed.), pp. 741–743, and cases cited; Eden on Bankruptcy, 110; *Horner v. Spelman*, 78 Ill., 206; *Warner v.*
168 *Kronkite*, 6 Biss., 453; *In the matter of Devoe*, 2 Nat. Bank. Reg., 27; *Hughes v. Oliver*, 8 Pa. St., 426.

"Appellant urges that the judgment being provable, it is discharged. This contention is untenable, because the same section of the statute which accepts a debt created by fraud from the discharge, provides that it may be proved even though appellee had proved his judgment in bankruptcy and obtained a dividend less than the amount thereof. This would not operate to discharge appellant from the unpaid balance. (*Stokes v. Mason*, 12 Nat. Bank. Reg., 498; 10 R. I., 8.) The evidence is that no part of the judgment has been paid.

"Appellant's counsel objects to the exclusion of evidence tending to prove that there was no fraud in the transaction in respect of which the judgment was recovered. Such evidence is incompetent and it is properly excluded. (*Forsyth v. Vehmeyer*, and *Flannagan v. Pearson, supra.*) There was only one count in the declaration, and it was held in the last case that whether the judgment was rendered for fraud is not a question for the jury, but must be determined from the record. The suit having been a case of fraud, and the declaration having been framed accordingly, the judgment is conclusive as to the fraud, and the fraud is not, as contended by appellant's counsel, merged in the judgment. *Schuman v. Strauss*, 52 N. Y., 404, 408.

"Appellant assigns as error the sustaining a demurrer to his additional plea and demurrer, assigning especially that the plea is double, which it is, and is otherwise defective. The demurrer was properly sustained.

"It is objected that the amended declaration contains no *ad damnum*. The original declaration concludes with an *ad damnum*, and we are inclined to the opinion that the amended declaration may be regarded as an additional count, and the *ad damnum* in the original as applying to the latter declaration. No specific objection is made to the amended declaration for want of *ad damnum* in the trial court, nor was any motion made in arrest of judgment, and the objection therefore cannot be availed of here. *Barnes v. Brookman*, 107 Ill., 317; *Utter v. Jaffray*, 15 Ill. App., 236.

Lastly, it is objected that the damages are excessive. The court found the issues for the plaintiff, and found the debt to be
169 $833.35, and assessed the plaintiff's damages in the sum of $2,076.90. The evidence was that the interest due at the date of the judgment was $1,242.74, and the damages should have been assessed at the latter amount only. The court, in assessing the damages, evidently included the amount of the debt, $833.35, in the damages, and judgment was entered accordingly. Deducting from $2,076.90, the amount assessed as damages, $833.35, the remainder is $1,243.55. Appellee has filed a *remittitur* of all damages in excess of $1,242.74, the amount of the interest. A *remittitur* of $834.16 from the amount of damages, $2,076.90, will be entered here, so from that the judgment will be for $833.35 debt and $1,242.74 damages, and the judgment will be affirmed with directions to the trial court to enter a like *remittitur* in that court. Appellant not having specifically called the attention of the trial court to the excess of damages, he will not recover the costs of this court."

From a careful examination of the facts presented by the abstract in this case, and of the briefs herein, we have reached the same conclusion as was reached by the appellate court in its judgment, and we concur with the appellate court in its opinion and adopt the same as the opinion of this court.

The judgment of the appellate court for the first district is affirmed.

Judgment affirmed.

170 STATE OF ILLINOIS, } ss.:
Supreme Court, }

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, Nov. 2, 1898.

[Seal Supreme Court of Illinois.]

C. MAMER,
Clerk of the Supreme Court.

[Endorsed:] Illinois supreme court. Jacob Forsyth *v.* Henry F. T. Vehmeyer. Opinion. Filed Oct. 24, 1898. Mr. Edward Rohy.

171 At a supreme court begun and held at Springfield, on Tuesday, the sixth day of December, in the year of our Lord one thousand eight hundred and ninety eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin

D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the eighth day of December, A. D. 1898, certain proceedings were had and orders made by said court, among which is the following, viz:

JACOB FORSYTH *vs.* HENRY F. T. VEHMEYER. } 321. Appeal from Appellate Court of Illinois, First District.

Now, on this day, this cause coming on to be heard upon the petition of the appellant for a rehearing herein, and the court being now duly advised in the premises, it is considered and ordered by the court that said petition for a rehearing be overruled and denied.

And it is further considered by the court that said petitioner pay the costs and charges herein taxed.

172 And afterwards, to wit, on the 10th day of December, A. D. 1898, there was filed in said cause a certain petition and bond; which said petition and bond, with the endorsements thereon, are in the words and figures following, viz:

ILLINOIS, *ss:*

In the Supreme Court.

JACOB FORSYTH, Appellant, *vs.* HENRY F. T. VEHMEYER, Appellee. } Appeal from First District.

To the Honorable Joseph N. Carter, chief justice of the supreme court of Illinois:

The above-named appellant, Jacob Forsyth, respectfully petitions your honor to allow a writ of error for the removal of this cause to the Supreme Court of the United States, and to sign the citation, etc.

The decision of the cause is that the discharge in bankruptcy of Jacob Forsyth, duly granted by the district court of the United States in and for the district of Indiana, which was duly pleaded to the action and proved, is not sufficient to bar the action, and the case is within the jurisdiction of the Supreme Court of the United States for review thereof by writ of error.

EDWARD ROBY,
Counsel for said Jacob Forsyth.

Let a writ of error issue in pursuance of the within petition.

JOSEPH N. CARTER,
Chief Justice Supreme Court, State of Illinois.

173 Know all men by these presents that we, Jacob Forsyth, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto Henry F. T. Vehmeyer in the full and just sum of twenty-five hundred dollars, to be paid to the said Henry F. T. Vehmeyer, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a term of the supreme court of Illinois, in a suit depending in said court between said Jacob Forsyth, as appellant, and said Henry F. T. Vehmeyer, appellee, a judgment was rendered against the said Jacob Forsyth, appellant, affirming the judgment of the superior court of Cook county, in said State of Illinois, from which judgment the said Jacob Forsyth has sued out a writ of error from the Supreme Court of the United States to remove the said judgment if the supreme court of Illinois into said Supreme Court of the United States, and having obtained such writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Henry F. T. Vehmeyer, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

174 Now, the condition of the above obligation is such that if the said Jacob Forsyth shall prosecute said writ of error to effect and answer all damages and costs is he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[12½ cents revenue stamps.]

JACOB FORSYTH. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK, [SEAL.]
By JESSE SPALDING, *Res. Vice-Pres.* [SEAL.]
Attest: FREDERICK F. NORCROSS, *Res. Ass't Sec.*

Sealed and delivered in presence of—

——, ——.

Approved by—
JOSEPH N. CARTER,
Chief Justice Supreme Court, State of Illinois.

STATE OF ILLINOIS, } ss:
County of Cook, }

On this 9th day of December, 1898, before me personally came Frederick F. Norcross, known to me to be the resident assistant secretary of the American Surety Company of New York, the corporation described in and which executed the annexed bond of

175 Jacob Forsyth as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of Chicago,

State of Illinois; that he is the resident assistant secretary of said American Surety Company of New York and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of New York and is authorized to do business in the State of Illinois; that said company has complied with the provisions of the act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Jacob Forsyth is the corporate seal of said American Surety Company of New York and was thereto affixed by order and authority of the board of directors of said company, and that he signed his name thereto by like order and authority as resident assistant secretary, and that he is acquainted with Jesse Spalding and knows him to be the resident vice-president of the said company, and that the signature of the said Jesse Spalding subscribed to said bond is in the genuine handwriting of said Jesse Spalding and was thereto subscribed by order and authority of said board of directors, and that the assetts of said company, unincumbered and liable to execution, exceed its claims, debts, and liabil-ties of every nature whatsoever by more than the sum of five hundred thousand dollars.

FREDERICK F. NORCROSS.

Sworn to, acknowledged before me, and subscribed in my presence this 9th day of December, 1898.

R. R. GILNEY,
[SEAL.] *Notary Public.*

Endorsed on cover: Case No. 17,243. Illinois supreme court. Term No., 180. Oliver O. Forsyth, administrator of the estate of Jacob Forsyth, deceased, plaintiff in error, *vs.* Henry F. T. Vehmeyer. Filed January 3rd, 1899.